

CONGRESSIONAL CIVIL RIGHTS BILLS

HEARING
BEFORE THE
COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
ONE HUNDRED FIRST CONGRESS
FIRST SESSION

ON

S. 272 AND S. 1165

SEPTEMBER 14, 1989

Printed for the use of the Committee on Governmental Affairs



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1990

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S401-18

COMMITTEE ON GOVERNMENTAL AFFAIRS

SAM NUNN, Georgia	JOHN GLENN, Ohio, <i>Chairman</i>
CARL LEVIN, Michigan	WILLIAM V. ROTH, Jr., Delaware
JIM SASSER, Tennessee	TED STEVENS, Alaska
DAVID PRYOR, Arkansas	WILLIAM S. COHEN, Maine
JEFF BINGAMAN, New Mexico	WARREN B. RUDMAN, New Hampshire
HERBERT KOHL, Wisconsin	JOHN HEINZ, Pennsylvania
JOSEPH I. LIEBERMAN, Connecticut	PETE WILSON, California

Leonard Weiss, *Staff Director*
Robert Harris, *Deputy Staff Director*
Jo Anne Barnhart, *Minority Staff Director*
Michal Sue Prosser, *Chief Clerk*

CONTENTS

Opening statements:	Page
Senator Glenn	1
Senator Heinz	3

WITNESSES

THURSDAY, SEPTEMBER 14, 1989

Hon. John McCain, U.S. Senator from the State of Arizona	4
Hon. Lynn M. Martin, a Representative in Congress from the State of Ohio	7
Hon. Mary Rose Oakar, a Representative in Congress from the State of Ohio	9
Hon. Leon E. Panetta, a Representative in Congress from the State of California	10
Judith Kramer, Deputy Solicitor, U.S. Department of Labor	17
William B. Allen, Chairman, U.S. Commission on Civil Rights	21
James H. Troy, Director of Program Operations, Equal Employment Opportunity Commission	23
Sharon Rodine, president, National Women's Political Caucus	31
Jackie Parker, Chair, Senate Black Legislative Staff Caucus	33

ALPHABETICAL LIST OF WITNESSES

Allen, William B.:	
Testimony	21
Prepared statement	83
Kramer, Judith E.:	
Testimony	17
Prepared statement	75
Martin, Hon. Lynn M.:	
Testimony	7
Prepared statement	54
McCain, Hon. John:	
Testimony	4
Prepared statement	52
Oakar, Hon. Mary Rose:	
Testimony	9
Prepared statement	63
Panetta, Hon. Leon E.:	
Testimony	10
Prepared statement	68
Parker, Jackie:	
Testimony	33
Prepared statement with an attachment	109
Rodine, Sharon:	
Testimony	31
Prepared statement	104
Troy, James H.:	
Testimony	23
Prepared statement	92

APPENDIX

Text of S. 272	39
Text of S. 1165	42
Prepared statements of witnesses in order of appearance	52

IV

	Page
Statements of:	
Hon. Patrick Leahy, U.S. Senator from the State of Vermont	120
Hon. Paul Simon, U.S. Senator from the State of Illinois	123
Linda B. Berg, attorney at law	127
U.S. Senate Personal Staffs and Committee Staffs (chart).....	133
Women and Blacks Scarce on Senate Committee Staffs (chart), from the Washington Times May 1988.....	134
"Extending Equal Employment Opportunity Law to Congress," report of the U.S. Commission on Civil Rights, June 1980	135

CONGRESSIONAL CIVIL RIGHTS BILLS

THURSDAY, SEPTEMBER 14, 1989

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:32 a.m., in room SD-342, Dirksen Senate Office Building, Hon. John Glenn, Chairman of the Committee, presiding.

Present: Senator Glenn and Senator Heinz.

OPENING STATEMENT OF CHAIRMAN GLENN

Chairman GLENN. The hearing will be in order.

Today the Committee on Governmental Affairs will begin hearings on S. 1165, legislation which Senator McCain and I introduced in June, and S. 272, legislation introduced by Senator Leahy in January of this year.

However, the efforts to eliminate the congressional "double standard" that exists with respect to congressional employees goes back further than this year's effort. I, for instance, first introduced a resolution on this issue way back in 1978, just a year and a half or so after I first came to the Senate. Senator Leahy first introduced his bill in 1979.

Now, I believe the application of this congressional "double standard" does great damage to the public's perception of Congress. Senator Sam Ervin, a great constitutional scholar, once said of this situation: "It is like a doctor prescribing medicine for a patient that he himself would not take."

I agree with this sentiment. What we have done in this Congress is to enact laws which we ourselves have not been willing to follow.

In my travels through Ohio and different parts of the country, businesspersons have said to me many times: "You don't understand the implications of the laws because you don't have to follow them on Capitol Hill"—and they are right, they have a point. It smacks of hypocrisy to those on the outside who have to follow our laws that those who make the laws are exempted from their application.

The progress that Congress has made in the past has been slow. In January of 1979, we adopted a rule, Rule 42—and it is part of the Code of Official Conduct for the Senate—that followed our inability to get through more substantive legislation which I had proposed at that time. Rule 42 prohibits hiring discrimination based on an individual's race, color, religion, sex, national origin, age or state of physical handicap. Rule 42, however, has no enforcement mechanism and no standards for accountability.

The only positive action we have taken over the past several years has been to eliminate our exemption from the Social Security Act. Our employees can now be covered under the Social Security Act. But what about the Civil Rights Act of 1964, which prohibits discrimination in hiring, working conditions, and promotions? Why aren't our employees covered under the Equal Employment Act of 1972; under the Age Discrimination Act; under the Equal Pay Act; under the Fair Labor Standards Act, as well as the Occupational Safety and Health Act, that apply to every business and every other organized entity across this whole Nation?

So what we do in this legislation is to not just address the issues of civil rights. We combine that now with the following legislation that we now will make applicable on Capitol Hill: the Equal Pay Act, the Civil Rights Act of 1964, the Occupational Safety and Health Act of 1970, the Age Discrimination Law of 1976, the Fair Labor Standards Act of 1938—that is basically minimum wage—the Rehabilitation Act of 1973.

Now, I am not just talking about the legislative and administrative members of the personal and committee staffs, which is what we tend to think in terms of here on Capitol Hill. It is also the painters and the window washers and the groundskeepers, the domestics, the folding room personnel, the plumbers, and all the other workers who do not enjoy the same rights as every other American in the outside workplace.

We make the rules, but they don't apply to us. They apply to everyone else—businesses, colleges, State governments, Federal work force—but not to us. And that is not right; that is unacceptable. People in Government are Americans, and they deserve to be treated with every protection of law as much as anyone else in this country.

The Governmental Affairs Committee conducted a survey of some of the jobs that come under the Architect of the Capitol, as an example. That survey showed that about 90 percent of black workers are listed as laborers, or Level 4, starting at \$14,000 a year, while 90 percent of the white workers in this survey start at Level 7, about \$19,500 a year. Now, it could be—I don't know—it could be that there is a definite nondiscriminatory rationale for this situation. Maybe there are other ways to explain that; I don't know. But if black workers felt that these figures represented a discriminatory situation, what do they do? They have no place to turn right now. Where could they turn? They are reduced to writing anonymous letters to Senators and Congresspersons to complain about the situation.

You remember a year or so ago, the folding room situation over on the House side, the printing setup over there—OSHA rules being violated all over the place. OSHA rules don't apply on Capitol Hill so workers had no recourse. And yet those laws would apply to any other printing shop, any other folding room across the United States of America if it were private employment that we were talking about. That's wrong to exempt your own employees from that safety feature.

The window washers have sent a letter around. They have some complaints. They claim there are some dangerous situations that they are involved with here. Are they valid? I don't know. I

haven't looked at that personally. I know that they are concerned about it, and I know they have no one to turn to, so they are reduced to writing letters to Senators see if someone can't do something.

Certainly, we should apply the laws that apply across the country to ourselves, right here, and those people who depend upon us here on Capitol Hill.

Now, there are some good reasons why some of these things have occurred and why we were not able to get legislation through in the past. One, for instance, was that it wasn't just the antipathy of having a law that tells Senators and Congresspeople how to run their operation. The other one was a very legitimate concern about the separation of powers as provided under the Constitution, in that the way we were trying to get things through back in those days was that the executive branch would administer the enforcement of the laws, and that gets a little bit sticky, because a politically motivated executive branch could perhaps do some things with regard to enforcement on the legislative branch that would have the potential at least of forcing us into things they want on a different area. So there was that kind of concern, and what we've done in this legislation is address that concern by setting up a separate administering body for this that appeals can be made to right here on Capitol Hill.

We have a full agenda of witnesses who will address many of the issues and implications of this situation. We will be glad to hear their testimony regarding the impact of S. 1165 and S. 272.

Cosponsors of this are Senator McCain, myself, Senator Mikulski, Senator DeConcini, Senator Burdick, and Senator Paul Simon.

So we are glad to have the testimony this morning. We hope, since we do have quite a number of witnesses, that people could be as brief as they possibly can be. I hate to just put the bell on or the light on on people within a certain number of minutes, but we do want to get a chance to get everybody on.

Chairman GLENN. Senator Heinz.

OPENING STATEMENT OF SENATOR HEINZ

Senator HEINZ. I will be brief, Mr. Chairman.

I commend you on holding these hearings not only because of the many good reasons you have expressed, but also because earlier this year, I was down in one large Latin American country where they have a saying that is also pretty much a code of conduct for many people in government. It goes: "For my friends, anything; for my enemies, the law." That is just about the way Congress handles its employee relations.

Congress treats itself as its own best friend and subjects everybody else in the country, save the Congress, to the law.

I think we would be better advised to remember what our fourth President, James Madison, once suggested to the House of Representatives. Make no law which will not have its full operation on themselves and their friends as well as on the great mass of society.

I wholeheartedly agree with the principles of S. 1165. That is why I cosponsored S. 2428 in the last Congress, the Congressional and Judicial Equal Employment Opportunity Act.

I think we do need to protect our personnel, but I think we need to have the right balance. I think we need to protect against executive branch interference and we need to be cognizant of the fact that there are, as Senator McCain's legislation recognizes, some differences in terms of domicile and political affiliation that for our personal offices can and should legitimately be taken into account. I think we would be well-served as a Congress, as an institutional body, in enacting legislation like S. 1165, to repeal the axiom: "Do as I say, not as I do."

Thank you, Mr. Chairman.

[Senator Heinz' prepared statement follows:]

PREPARED STATEMENT OF SENATOR HEINZ

Mr. Chairman, I want to thank you for holding this hearing on legislation to eliminate Congressional exemptions to certain Federal employment laws thus requiring Congress to provide for fair employment practices.

Our fourth President, James Madison, once suggested to the House "to make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society." I wholeheartedly agree with his message. Appropriately, the legislation before us today addresses concerns that Congress exempts itself from labor laws, occupational safety and health regulations.

During the last Congress, I was a cosponsor of S. 2428, the Congressional and Judicial Equal Employment Opportunity Act. I believe that legislation struck an equitable balance by protecting congressional personnel, with an appropriate review process. This legislation, like other measures, recognized the uniqueness of congressional operations and our personal offices with regard to an applicant or employees' domicile and political affiliation.

Mr. Chairman, Congress should no longer operate by the axiom "do as I say and not as I do." Let's bring the legislative and judicial branches into compliance with the laws governing private sector employees and executive branch employees.

It is my sincere hope we can act responsively to end discrimination and bias in the hiring of congressional employees—insuring an equitable, fair, and safe working conditions on Capitol Hill.

Thank you, Mr. Chairman.

Chairman GLENN. Thank you, Senator Heinz.

Senator Leahy asked me to announce he could not be here for the opening of today's hearings. He will perhaps be back in time at the end of the hearings to give his testimony. He is attending his son Mark's graduation from Camp Lejeune School of Infantry, which is a subject that I certainly support. Hopefully, he will be able to join us later. He is very concerned about this issue, also, and has his own bill in on this. So perhaps he will join us later on.

Our first witness this morning is Senator McCain. Senator, I know of your personal interest in this, and we appreciate your support and your willingness to testify this morning and look forward to your testimony.

Senator McCain.

TESTIMONY OF HON. JOHN MCCAIN, U.S. SENATOR FROM THE STATE OF ARIZONA ¹

Senator McCain. Thank you, Mr. Chairman.

¹ See p. 52 for Senator McCain's prepared statement.

I would ask that my complete statement be made part of the record, and keeping with your admonition, I will attempt to be brief.

Chairman GLENN. It will be included.

Senator MCCAIN. Mr. Chairman, I'd like to start out by thanking you for your leadership in this effort. I don't think it is accidental, nor will it surprise anyone, that you would take the lead on this issue, given your many decades' commitment to ensuring the equal rights of all Americans in our society. And although this legislation is long overdue, your commitment to this principle obviously is clear and one which goes back for many years.

Mr. Chairman, I think this hearing is a vital step toward ending a double standard of inappropriate Congressional privilege and ending Congress' stubborn insistence on being the "last plantation".

I don't think this double standard that exists is any more defensible than apartheid. We cannot continue to support maintaining one set of rules of privilege for ourselves and a set of far more restrictive rules for the remaining majority of society.

I also would like to congratulate Senator Leahy for his introduction of S. 272, which I think is an important contribution in this effort.

As you know, Mr. Chairman, at the end of last session, and again this year, I introduced legislation that was designed to secure the rights of Senate employees, because we truly are the last bastion of this form of legal discrimination, given that the House of Representatives has enacted similar legislation to this. Frankly, I was slightly embarrassed to be a Member of a body that is the last organization in America which fails to adhere to the rules, regulations, and standards which we in Congress impose on the rest of our society.

I believe that the Members who serve in Congress have made every effort to comply with laws that Congress has passed. However, there can be no room for cases of legal discrimination here on Capitol Hill; Mr. Chairman, simply stated, discrimination cannot be tolerated in any environment.

By the creation of a Congressional Employee Relations Office, S. 1165 solves any constitutional problem. Any alleged violations of the labor standards would be dealt with by the office. Final authority would lie with a review panel consisting of House and Senate Members. Any monetary awards granted would have to receive approval of the full House and Senate.

Further, this legislation rightly allows Members to continue to have discretion they may need in hiring their personal staffs. This measure imposes no restrictions on Members who might choose their staff solely from their State. In addition, no provisions of this measure would prohibit a Member from hiring a completely partisan staff. These individual options are preserved under this bill.

Mr. Chairman, public perception of Congress as an institution in my view is at an all-time low. Mark Twain once said, "It could probably be shown by facts and figures that there is no distinctly native American criminal class except Congress." It is unfortunate that in the eyes of the public, this quote is now more true in perception than ever. Continuing to exempt Congress from the fair

labor standards it passes only further erodes the confidence of the American people.

I noted with interest last week, Mr. Chairman, that the Senate passed the Americans With Disabilities Act to protect the civil rights of the disabled in this country, another area in which the Chairman was deeply involved. The Senate rightly, I believe, included itself under the provisions of that bill. We must now apply all the civil rights and fair labor standards to Congress.

If Congress believes that the measures it passes are truly worthy, then they must apply to Congress. We must remedy the glaring disparity that now exists. The two bills before the Committee today are needed not only to help restore public confidence in the Congress, but because it is the fair and right thing to do.

I thank you, Mr. Chairman, for the opportunity of being here and working with you on what I believe is a very, very, very important issue, and the only thing that puzzles me about it, very frankly, is that it has not been addressed years ago.

Thank you, Mr. Chairman.

Chairman GLENN. Thank you very much, Senator McCain.

The Disabilities Act is one that, if it gets through and is completed and into law by the time we get through marking this up, we undoubtedly will want to amend that into this thing before we report it out to the floor. I think that is good that you pointed that out.

And you pointed out the party affiliations; the other is domicile—if a person prefers to hire someone from their home State because of our particular parochial interests, that does not prohibit it, either—so we make those two exceptions here that I think we are well-advised to make.

Thank you very much.

Senator MCCAIN. One other comment, Mr. Chairman, that I think has been lost, but which you pointed out very succinctly in your statement, and which I think needs reemphasis. We are not only talking about the staff members in this room, who obviously need these kinds of protections, but we are talking about some very low-income Americans whom and employed by the Senate, who—as you stated, there have been allegations leveled, whether rightly or wrongly—clearly need protection under the law.

Thank you, Mr. Chairman.

Chairman GLENN. We are in effect a city here on Capitol Hill. We have every kind of person involved here on Capitol Hill—we have people who unplug the pipes, the plumbers, and do the construction work around here; we have day laborers; we have doctoral degrees—we have every level that is in any city around the country, and yet we exempt ourselves from all these laws that apply to every city around the country.

So as you point out, that's exactly what this is about. It is not just staffs that sit in the offices; it is everybody who does the labor and everything else around here on Capitol Hill, also.

Senator MCCAIN. Thank you, Mr. Chairman.

Chairman GLENN. Thank you much.

The House of Representatives has had some experience with some legislation they passed about a year ago, I believe it was, and

we appreciate their willingness to come over and testify on this this morning to help us out in our consideration of this legislation.

Our legislation if passed, of course, would apply to the whole Congress, not just to the Senate here, and so it is right that we have testimony from the House on this, also.

With us this morning is the Honorable Lynn Martin, representing the State of Illinois. Lynn, we are glad to have your testimony this morning.

Please proceed.

**TESTIMONY OF HON. LYNN M. MARTIN, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ILLINOIS ¹**

Ms. MARTIN. Thank you very much, Senator, and I join with your colleague from Arizona in congratulating you on having these hearings and moving forward something to which your commitment and certainly Senator Leahy's and Senator McCain's is well-known. I think that does indicate the bipartisan nature of the desire for change that should occur. And my colleague, Congresswoman Oakar, joins me——

Chairman GLENN. Before you start, we have three people from the House of Representatives: the Honorable Leon Panetta of California; Lynn Martin of Illinois, and Mary Rose Oakar of our home State of Ohio. Mr. Panetta is on the way over, and they will all three be part of a panel here.

Ms. Martin, go ahead.

Ms. MARTIN. Thank you, and I would ask that my remarks could be made part of your official record.

Chairman GLENN. The entire statement will be included in the record.

Ms. MARTIN. Thank you.

Mr. Chairman, you have wisely talked about the issue of fairness and justice for the thousands of men and women who work within the legislative branch of the Federal Government. And over the past several decades, major pieces of legislation have been enacted by the Senate and by the House which pertain to labor standards and to fair employment practices. I think always, of course, of the Civil Rights Act of 1964, specifically title VII, of that act.

And yet we know that there is one group that those provisions do not apply to, and that is the employees of the Congress of the United States which drafted and passed those laws and the employees of the Federal judiciary, which we use to enforce the laws. On its face alone, this omission is unfair and absolutely indefensible.

The fact that most Members of this institution and the judiciary are too honorable to consider intentionally discriminating against an employee, or that internal rules encourage compliance, does not justify this omission or guarantee against discrimination.

When I was a Member with Congresswoman Oakar of the Accounts Subcommittee of the House Committee on Administration, I found, for example, that there existed a large and pervasive wage differential between male and female employees. A study I did on pay equity at that time indicated that 81 percent of those commit-

¹ See p. 54 for Congresswoman Martin's prepared statement.

tee staffers earning \$20,000 a year or less were female, while 70 percent of those earning \$40,000 or more were male.

Was this intentional or planned discrimination? Probably not. More likely, it was just the carrying on of business as usual. Was it nonetheless systematic and discriminatory? The answer is: Absolutely.

Though a more recent survey of the committee salary structure suggests an improvement, the legal foundation which would make these improvements secure and permanent is not in place. And what you are doing today is considering the beginnings of the legislation that would do so.

So with the assumption that there is agreement that something must be done and with the understanding, if I can quote a Member of our body, Henry Hyde of Illinois, who said that Congress would try to exempt itself from the laws of gravity if it could, with that understanding, it is how do we best approach this, and there are two different approaches that can be taken, one of which is supported and introduced by you, and the other by your colleague from Vermont.

I believe that S. 1165 is nearly identical in approach and the specific provisions to the legislation which passed in the House last year. And although I participated directly in drafting legislation along with my colleagues on this panel, who were excellent, I do not believe that it is a wholly satisfactory solution. Rather than amending Federal law to eliminate the congressional exemption from coverage, S. 1165 would create this intermediate body within the legislature to apply those laws.

The Senate would remain, as the House is now, one step removed from responsibility under law, and Senate employees, like their House counterparts, would remain one step removed from protection under the law.

Chairman Panetta of the task force and I last year both indicated on the House floor our desire in fact to ultimately move to statute to correct any imbalance, because a rule is not the same as a law. More important and more to the point, current arrangements in the House and the arrangements being proposed in S. 1165 do still not provide employees adequate recourse in those cases where discrimination does occur or is suspected.

One clear problem with the approach is that Members of the House and Senate, along with designated members of their staffs, would remain the final arbiters in cases brought by legislative employees against member offices. I believe that if the review and adjudication process is to be credible to the employees, objective and impartial review must be more assured than under this process.

Therefore, Senator Leahy's bill, which is similar in approach, though not in all its particulars, to other bills that have been introduced in the House, one of which was mine, may be a better solution.

So I can certainly compliment you. As part of the group that was responsible for the House action, it is a necessary step. But I would also ask you to learn from our experience and to also accept my firm belief that a statute is needed rather than just rule, and since under your excellent leadership the Senate could move an even further step forward than my current body, I would hope you

would examine carefully the Leahy provisions and consider them strongly.

I thank you for your leadership, Mr. Chairman.

Chairman GLENN. We will indeed, and thank you very much for your kind statements.

Congresswoman Oakar.

TESTIMONY OF HON. MARY ROSE OAKAR, A REPRESENTATIVE IN CONGRESS, FROM THE STATE OF OHIO¹

Ms. OAKAR. Thank you, Mr. Chairman.

First of all, I want to commend you and Senator McCain for introducing S. 1165. I am delighted to be able to appear with my distinguished colleagues. And it is true that last session the House, under the leadership of Leon Panetta, with the wonderful assistance of Lynn and others, did pass a bill that for the first time had some standard by which grievances could be heard in the House of Representatives by its own employees.

I think to an extent, that system seems to be working. I am not on the panel, but I do chair a committee which Congressman Panetta used to chair, related to police and personnel, and apparently there have been complaints, and the panel is dealing with those in competence and will be making some kinds of decisions relative to the complaints that they have had.

Senator, I recall that you were the first person in both bodies that I can remember some years ago who talked about this problem, and I remember being very proud of you, of course, being my senior Senator from my State, that you had the courage to do that, and I appreciate that.

I want to say, however, that I recall at the time the pressure that you were under not to do it. And any time we offer bills of this nature—I know in my own situation, as you know, I have tried to get a pay equity study on all Federal employees passed for about 8 years now, and somehow it never quite makes it to the floor—not because of you, because you have been very helpful—and just study it so we can deal with the problems equitably.

We have a daycare center on both sides to try to improve the quality of life for our employees, and now we have tremendous waiting lists. So we are behind. And frankly, since I have taken over the chairmanship of Police and Personnel, I have to tell you, and again I want to stress, as my colleague Lynn Martin stressed, that in most cases, it is not malicious intent, but honestly, I think there is a plantation mentality around this place, I truly do. And it is not only our own employees. It is the people who work in and around the Hill. And it is not wholesale, but it is a problem, and it especially affects—it can affect white men, there is no question about that, particularly younger individuals—but there is no question in my mind that there is a need to change the way we operate relative to women and minorities. There is just no question in my mind about that.

And again, I think part of it is the cultural—you know, we have always done it that way, and so on and so forth. So I don't always

¹ See p. 63 for Congresswoman Oakar's prepared statement.

think it is a willful intention to violate the spirit of any civil rights act and so forth. But it exists, and it is very disheartening to me personally to see that kind of attitude around the Hill when we should be a hallmark for equality in the manner in which we treat our employees.

Mr. Chairman, I think your bill is terrific. In fact, I think there are some things about it that are better than the House's approach, it seems to me, although we are still somewhat new.

The one thing I would suggest to you in terms of your panel is I think it is important to have Hill staffers on part of the panel review. I think they are peers, and they know what it is like, and I think that they can be very, very helpful, as they apparently are with respect to the House provisions, in dealing with the spirit of fairness.

So Mr. Chairman, I want to compliment you. I think we should do it jointly. I think, just as we have joint kinds of jurisdiction over the police personnel, that doesn't make sense to me since it is all Capitol Hill—I see no reason why the House and the Senate ought not to get together more on issues of this nature. So I certainly applaud that spirit. I think we ought to do it.

I just want to ask unanimous consent to put my entire statement in the record, and I want to thank you for having the courage to be a leader in this area some years back, and plodding through and now, as Chairman of this Committee that has the jurisdiction on the Senate side, I know you are going to continue that effort.

Chairman GLENN. Thank you very much.

Your entire statement will be included in the record.

Ms. OAKAR. Thank you, Mr. Chairman, and thank you, Senator. Chairman GLENN. Congressman Panetta.

TESTIMONY OF HON. LEON E. PANETTA, A REPRESENTATIVE IN CONGRESS, FROM THE STATE OF CALIFORNIA ¹

Mr. PANETTA. Mr. Chairman, thank you for inviting me to testify on the legislation. I want to commend you and the rest of the Committee for taking a look at this very important issue.

Obviously, it is a problem of balancing several concerns—the concerns that Ms. Oakar referred to in terms of the plantation mentality, and the fact that there is a basic unfairness about laws that we apply everywhere else and not applying them to the employees of the House or the Senate, and that is recognized. But you also have to balance that versus the importance of preserving separation of the branches and the need for the legislative branch to be courageous enough to deal with these issues on its own rather than pass them off to another branch.

Those are the concerns that you essentially have to balance as you develop an approach here, and those were the issues that faced the House last year as we have dealt with it.

So it has to be approached carefully. I think that the House has taken a very important first step in the process we have put in place. It is a beginning. It is by no means the end of what needs to be done in terms of not only improving the process but also extend-

¹ See p. 68 for Congressman Panetta's prepared statement.

ing it to other laws. But I do recommend that you do it carefully because you are dealing with the institution, and the need to do it on a transitional basis I think is extremely important if it is going to work effectively.

We were able in the House, because of the initiative of people like Lynn Martin, Gus Hawkins, Pat Schroeder, Steve Bartlett, all of whom introduced legislation to try to implement laws that we adopted for others to the House, we were able to hold hearings and then to work together as a group to put the legislation that we implemented as our resolution in the House last year. It wasn't easy, incidentally. There was a lot of resistance about moving in that direction, resistance which is historical in the institution, but nevertheless a combination of factors—I think the fact that there was a tremendous amount of focus on what was happening with regard to House employees; in addition to that, I think there was a move already taking place in the committees to in fact apply laws to the House, and a recognition of that by the leadership convinced them that they had to move in this direction.

The bill that we provided—the way we looked at it, we said we need to take this important first step, and what is the place to do that that would be most acceptable in terms of the Members. That is the area of discrimination. So that is why we focused initially on discrimination. We passed a civil rights law almost 25 years ago. It has never applied to the Congress. That was an outrage. And we felt that this was the one area where in fact we could make an immediate step to apply those same rights and protections to all of the House employees. That is why we basically stressed the discrimination issue as our first area to concentrate on.

The problem with other areas, whether you are dealing with OSHA laws or other things, is we have to take a look at how those particular laws apply to the institution and what the ramifications are. I am not opposed to extending them, but I think we've got to continue to look at those other laws and gradually introduce those other protections as well. But the first one was discrimination, and that's what we did on the House side in terms of protection on the basis of race, color, national origin, religion, sex, handicap or age; those are the protections that we provide to our employees.

We established an Office of Fair Employment Practices and a review panel, very similar to what you have. The stress that we provided—and I can't underestimate this in terms of its importance—is mediation. Counseling and mediation is extremely important.

We have found that there are about 25 cases a month coming before this Fair Employment Practices group right now—about 25 cases a month. We are able to deal with the vast majority of them through mediation and counseling. That is extremely important, and I would urge that as a part of this process. We provide 180 days for basically counseling and mediation that would take place. Then they can proceed with a formal complaint and a request for hearing, and that hearing is held before a hearing officer, and you have a right to an attorney, right to cross-examination, all of the protections of due process; and then a final review, obviously, by the review panel, which is established on the basis of combining

not only members of the House, but also employees from both sides of the aisle, Democrats and Republicans both.

The remedies are very similar to what you provide—monetary compensation, injunctive relief, costs and attorneys' fees, employment and reinstatement. Again, we had some problems when we developed the whole issues of remedies. Let me tell you that there were some members who were screaming at me about the possibility of reinstating employees, and yet that is a basic right that individuals have if in fact they have been discriminated against, and you have to provide that remedy. But I can assure you that it was not pleasant to deal with that particular element, and yet it is essential if you are going to have a process that has credibility.

We were able to do this building on what we had initially done in an adverse action procedure that we set up specifically just for the employees that we call the classified employees on the House side. We had already developed that so it was easy to then kind of build on that process in terms of extending it to other employees of the House.

There is no question, and you know the arguments for why this has to be done. It is a basic issue of fairness. If we don't do this, let me tell you we'll be forced to do it because committees in both the House and the Senate will actually apply it in law then. If we don't do this, we are going to wind up in lawsuits, which is exactly what has happened before. They have taken us to court on almost every one of these cases because there is no procedure. If we have a procedure, I think the courts can legitimately say the branch is taking care of its own problems.

And if we don't develop this procedure, then these issues are going to be fought out in the news media. That is essentially what is going to happen.

So I think for all of those reasons, it is very important to have this kind of process, and I commend you for moving in this direction. Let me just make a couple of comments about the bill that you have.

You suggest a joint House/Senate operation. I would suggest that you may want to set up the Senate operation first because although we know there are some similarities, there are a hell of a lot of differences in the way we operate, and I think you ought to be very careful about trying to combine these systems as a beginning. I think I would rather you kind of set up your Senate operation because all of you know how you have to deal with those issues, and I think then we can look at the best of both and perhaps combine them later on.

Secondly, on the review panel, I would, along with Mary Rose Oakar, stress that instead of just having members as part of that review panel, I think it is very essential to have employees represented as well and officers of both the House and the Senate because after all, the employees are entitled to have their peers also make these judgments on the review panel.

So with those comments, I urge you to proceed along the path that you have now begin. As I have said, I am very proud of what the House has done. It is a beginning step. Much more needs to be done. But we are perfectly willing and encouraged that we both walk in the same direction.

Thank you, Mr. Chairman.

Chairman GLENN. Good. I appreciate all of your excellent comments.

This House versus Senate on this and how we apply it is one I might ask your advice on. We considered that. We talked to some of you, as a matter of fact, about this before we wrote it up the way we did. It is not only that—we do operate in different ways, but we include more things in this. We've got the Equal Pay Act, Civil Rights Act, OSHA, Age Discrimination law, Fair Labor Standards Act, and the Rehabilitation Act of 1973. That's a broader loop than you swung over in the House, and it puts a different complexion on this thing. Do you see any difficulty with that, any of you?

Mr. PANETTA. No, not at all. I think you are moving in the right areas. The areas that you defined are, I think, the logical ones to proceed with, and I think it is doable in those areas. My only concern, again, is more the question of—I think we ought to proceed, frankly, in the House to basically extend our protections to those same laws if you move in that direction. My only concern, again, is the question of how it works on a joint basis, because you are dealing with separate institutions that have their basic traditions, and also, the way you operate it sometimes very different from the way the House operates—the question of how we cover the Architect's office, the question of how we are going to deal with some of these employee groups in between.

I just think that rather than delaying further action based on the need to kind of create a joint operation, I would rather have the Senate kind of set up its own thing and move quickly with that.

Chairman GLENN. Do you have any comment on that, Lynn, or Mary Rose?

Ms. MARTIN. Senator, the only thing—and I don't disagree with Leon that often—the more things we can do jointly, I think the more sense it makes. While we all talk about our own traditions—and not in Leon's case, ever—those are often almost code words for just so we don't have to do something. An employee of the House is often loyal to an individual Senator or an individual Member, and both bodies pride themselves on their traditions. But overwhelmingly they share some of the same problems in regard to employees not just of their offices, but of the entire Capitol forces, whatever they be. I think you should be commended for trying to move it jointly. I think that is an excellent idea.

Chairman GLENN. Mary Rose.

Ms. OAKAR. Yes, Senator, I think it should be jointly if possible and iron out a few wrinkles. One quick thing is it is not just the employees of the committees and the offices that I am concerned about, and I think we should be; but if you take a look at those who are under the jurisdiction and some of the officers of the House, certain types of jobs are capped, usually female-dominated—I mean, they are just antiquated classification systems, and they really ought to be just looked at again.

And as Leon said, mediation is so important because very often, if you point this out, since we don't have—in terms of setting salaries, for example, and even in terms of setting vacation time and so on—we don't really have a book that says you will pay a secretary

so much and so on. We are pretty free to do what we want to do in that, and maybe one of these days we'll have some guidelines or parameters. But because of that, we ought to really take a close look at what is classified and how unfair some of the classifications are.

I think a joint kind of effort in that respect would really complement the system.

Ms. MARTIN. I agree.

Chairman GLENN. You say you have about 25 cases a month coming before you over there right now. I wasn't aware you had that many cases coming before you. Have any of those been awarded monetary compensation, dollar values?

Mr. PANETTA. No, Senator. As a matter of fact—and again, there is some confidentiality that obviously surrounds these cases—but right now there is, as I understand it, only one that has moved to the hearing process. So we have had one that has gone the whole distance.

Chairman GLENN. So the mediation process has worked to take care of most of these, then.

Mr. PANETTA. It has indeed.

Chairman GLENN. OK. The thing that you mentioned, Lynn, about there may be a feeling that Congress cannot or will not effectively police itself, and we are still going to be suspect maybe on some of these things, and I think you suggested to take care of some of those fears, your legislation called for a retired Federal judge to hear discrimination cases. Do you think that is necessary, or do you think we can do this in-house?

Ms. MARTIN. Obviously, to get anything done, one is willing to compromise. I think that if you are an employee, and if the whole process, you are going before other members of Congress, I think inherent in that is difficulties, because especially—not so much for those who aren't employees of Congress—but if I adjudge that I am being discriminated against by a Senator, and the panel is three other Senators, I may never believe I am going to get a fair hearing. We were trying to do that, and the other reason for that, quite obviously, was trying to get around and through the Constitutionality problem of separation of powers. And we thought that, although they were retired Federal judges, they were selected from a corps that the Speaker and the President of the Senate and the minority leader of both bodies had a part in. So constitutional scholars felt that that worked.

But you can argue for other ways. I couldn't agree more with Leon and with Mary Rose that if it is just Members, though, that has to be a pretty frightening visage to someone who is going to claim, say, sex discrimination.

Ms. OAKAR. That's right.

Ms. MARTIN. Three male Members, you know.

Chairman GLENN. Could you give me an estimate of what it cost to set this up over there? It cost something to do it and something to administer it, and then there is always the thing of awards if they ever came. I believe you handle that with a panel; we would handle it in this legislation by referring it to the full Senate.

Comment on that, if you would, and what the costs have been and how you set up your awards system.

Mr. PANETTA. Yes. Obviously, since we haven't had any cases that have reached adjudication, we haven't had that. Our approach basically was to take the compensation out of a House fund that is available for that purpose, and therefore it did not involve any additional cost, at least with regard to setting up the fund for compensation.

On the setting up of the actual office itself, it was really pretty minimal, because we were looking at about four or five employees at most, including a director plus a hearing officer plus a professional mediator and consultant. So it is just basically the salaries of those individuals—

Chairman GLENN. Do you absorb that, or do you actually have an appropriation for that?

Mr. PANETTA. No; actually, we absorbed that.

Chairman GLENN. You absorbed it, OK.

Mr. PANETTA. It is basically coming out of the Clerk's office.

Chairman GLENN. OK.

Ms. MARTIN. May I comment on something Leon said, and I believe it was Mary Rose's idea, but I know it wasn't mine, and it was an excellent one. That was to have the professional people involved in terms of a professional mediator, someone who was not viewed as the AA to the Senator, or an employee of the Clerk of the House. These were professional people whose jobs are mediation, and I think that is reassuring and an important part of the mix, too. It wasn't my idea, or believe me, I'd take credit, but whoever's it was, it was a good one.

Chairman GLENN. The argument that we'll hear against this is that we are elected by the people—and I am sure you've heard this over there—we are elected by the people, and if there is discrimination on Capitol Hill, and the people don't like it, they will un-elect us the next time we run for office.

Ms. OAKAR. Sure, sure.

Ms. MARTIN. Yes, sure. [Laughter.]

They don't say that back home, by the way.

Chairman GLENN. So we've tried to take it out of that, but that's—

Ms. OAKAR. You have a great sense of humor, John. [Laughter.]

Chairman GLENN. Well, it came up the last time around, of course; we ran into that head-on, and if people don't like what we're doing, why, they will un-elect us. Well, I suppose that's what every businessman says, too: If the people don't like the way we manufacture our product, they won't buy it.

Ms. OAKAR. Right. They'll go somewhere else.

Ms. MARTIN. The other one that fascinated me was—and that was the plantation mentality. "My employees are really happy. They won't want anything like this."

Ms. OAKAR. Yes, right.

Mr. PANETTA. The basic response to that, Senator, if I might—and we obviously faced that, and I faced it from some pretty senior chairmen—

Chairman GLENN. Now, when I made that last plantation remark on the floor, I didn't have people speaking to me for about 6 months around here.

Mr. PANETTA. Beyond the issue of just simple morality, of the importance of applying equal rights to your own staff if required of others—which I think is obviously the most important point—beyond that, members are not going to escape this issue. If you have an individual on your staff who feels that they are discriminated against, and they don't have a vehicle, they don't have a process, then they are going to take it out to the public in one way or another. They are either going to go to the press—and they have been; we have seen those articles, undermining the trust of people in this institution—and secondly, they are going to go to court.

You either face it one way or the other. I think it is much better for the institution to respond than to have that individual have to go either to a newspaper or go to court.

Chairman GLENN. Yes.

Ms. OAKAR. Mr. Chairman, also if I may, dovetailing on what Leon said, in addition it is for the protection of the members and the officers of the House to have this. There are times—some few times—when individuals irresponsibly, for whatever reasons, do a number on their employee. And I think that has to be taken into consideration. If you have a balanced panel that is truly constituted of attempts to be objective, you will protect individuals who are the employers in this case, the Members or the officers.

Chairman GLENN. Yes.

Ms. MARTIN. May I suggest one other thing. Both of my colleagues are absolutely right, and good, decent lawmakers are going to require that protection. So it is important that the Senators view that. But there is something else that you can point to—and maybe this would be a detriment, I don't know. But you know, the House has not fallen under this rule. I mean, this has not suddenly meant that every employee has left; all employees have not filed suits; Members have not been hung out to dry—I mean, we are actually functioning, sometimes well, sometimes badly, but with very little relationship to this.

So the doomsayers of what this was going to do, I think now if you asked most House members, they would be very glad they had it and are glad because most of them—just as the Senate—are very decent people who realize now that it is long overdue.

Chairman GLENN. Yes. One of the things that we copied directly out of your experience over there was the time frames for settling disputes in your resolution, House Resolution 558. We thought that was a good idea, and we adopted the same time frames in this legislation I have submitted. An employee has 180 days from the alleged violation to make a report, he has 30 days for counseling, 15 days to file a complaint. EEOC, though, has some concerns, as I understand it—and we'll have testimony from them later—EEOC has some concerns about putting those kinds of constraints into law.

What has been your experience over there? Would you comment on that briefly?

Mr. PANETTA. The time frame has worked very well. Our concern, you know, by establishing the 180 days—

Chairman GLENN. Excuse me. I understand you people are on a vote and you've got 4 minutes left—do you want to split? You'd better go. We'll be in touch with you on this thing.

Mr. PANETTA. Yes. Very quickly, I think the time frame has worked very well for us, because what we didn't want was a situation where 10 years ago they start bringing cases up. If you've got 180 days, that's the time to bring your complaint. If people know they've been beaten around or discriminated or harassed, that's the time to do it. If you leave this thing open-ended, it is dangerous, from both points of view. It is dangerous from a due process point of view.

So we felt that that was important, plus allowing for the period of mediation. If mediation and consultation is going to be an important part of this, then you have to allow the time for that to take place. Then you have the hearing process, and then you can proceed with it. But our experience is that the time frame is working very well because we are getting so much done through mediation and counseling.

Chairman GLENN. Thank you. We may have additional questions, and we want to be in continuing touch as we go through this.

Thank you very much for being here.

Ms. OAKAR. Thank you, Senator.

Mr. PANETTA. Thank you.

Chairman GLENN. Our next panel this morning includes Judith Kramer, Deputy Solicitor, Department of Labor; the Honorable William B. Allen, Chairman of the U.S. Civil Rights Commission, and Jim Troy, Director of Program Operations, Equal Employment Opportunity Commission. If you would come to the table, please, we'd appreciate it.

Ms. Kramer, Deputy Solicitor, Department of Labor, if you would lead off with your statement—we would appreciate it if your statements are lengthy, please summarize them because we do have a lot of testimony this morning. Your entire statements will be included in the record. If you feel you must give your full, lengthy statement, go ahead and do so, but we would appreciate a little bit of brevity.

Ms. Kramer.

TESTIMONY OF JUDITH E. KRAMER, DEPUTY SOLICITOR, U.S. DEPARTMENT OF LABOR ¹

Ms. KRAMER. Thank you, Mr. Chairman.

Mr. Chairman and members of the Committee, I wish to thank you for the opportunity to be here today to represent the Department of Labor at this important hearing.

We are pleased that you are considering legislation that would extend basic nondiscrimination and labor standards protection to employees of the Legislative Branch of our Federal Government. We understand that the Department of Justice will be providing additional views on this legislation in the near future.

The concepts of nondiscrimination in employment, a safe and health place to work, and basic minimum wage and overtime protection have become part of the American landscape. Today such concepts are broadly accepted as beneficial to employers, employees and to the country as a whole. Providing protection for American

¹ See p. 75 for Ms. Kramer's prepared statement.

workers is also a basic part of our mission at the Department of Labor.

We commend this Committee for taking on the task of considering legislation that would extend labor standards that now protect so many American workers to those who work for the Congress.

We recognize that you will face some significant challenges in developing legislation in this area. The Department of Labor has had considerable experience in administering programs of the type under discussion today, and we would be pleased to offer our assistance to you and your staffs in this important effort, based on our experience.

From time to time, various approaches to the extension of labor standards to legislative branch employees have been proposed. As we understand it, your Committee is currently considering both S. 272 and S. 1165. While these bills have the same basic objectives, there are significant differences in their approaches.

S. 272 would essentially extend the protection of six specified statutes to employees of "units of the legislative branch"—those statutes are listed in the legislation.

On the other hand, S. 1165 does not actually amend existing nondiscrimination and labor standards laws. Instead, that bill would "to the greatest extent applicable, apply to each congressional employee the principles and standards of" five of the six laws listed previously. And S. 1165 also does not contain a reference to the labor-management relations provisions of the Civil Service Reform Act as S. 272 does.

S. 1165 also contains an independent nondiscrimination provision.

Most significantly, since S. 1165 would not invoke existing enforcement procedures, it instead establishes a new 3-step complaint-generated procedure for considering alleged violations. The approach taken in S. 272 would involve the most consistency in protection of congressional employees with employees in other sectors of the work force with respect to both remedies as well as substantive rights. S. 1165, by contrast, establishes a new enforcement mechanism that would be notably less rigorous than the enforcement procedures applicable to both the private sector and the Executive Branch under the current respective statutes.

But regardless of the overall question of basic approach, we have also identified certain specific aspects of these two bills which we believe should receive additional consideration.

Section 7 of S. 272 would provide that the Occupational Safety and Health Act of 1970 apply to the legislative branch as if the Congress were a private sector employer. This would include imposing upon the Congress a full array of civil penalties that now apply to the private sector.

In its original enactment of OSHA, Congress made a judgment that it would be preferable to establish a different mechanism for applying OSHA standards to the Federal Government. Accordingly, section 19 of OSHA establishes a separate program to protect the safety and health of all Federal workers. In general, each agency head is vested with the responsibility "to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with" OSHA standards.

To implement this section, President Carter issued Executive Order 12196 and in turn the Secretary of Labor issued regulations to provide for the basic structure for such Federal programs. The regulations define "agency" as an agency in the executive branch. But this part is interesting, Mr. Chairman—since section 19 of the statute itself covers all Federal employees, which would include employees of the legislative and judicial branches, the regulations also provide that by agreement between the Secretary of Labor and the head of any agency of the legislative or judicial branch, the regulations may be made applicable to such agencies.

While there have been no formal agreements executed with any unit of Congress at this point, OSHA has responded to requests for assistance in some specific matters involving the Legislative Branch on a case-by-case basis.

In general, under Section 19 of OSHA, each agency, including those of the legislative and judicial branches, is required to establish its own safety and health program and to file an annual report with OSHA. OSHA has the responsibility of reviewing the reports and preparing an annual report to the President on the status of the Federal sector safety and health. In the nearly 20 years since enactment of the OSHA statute, we have had considerable experience with the Federal safety and health programs, especially as implemented by executive branch agencies. In our view, this approach has worked effectively to provide a safe and healthy work environment for Federal employees.

Section 4 of S. 272 would extend coverage of the Fair Labor Standards Act to all employees of the legislative branch. It should be noted that the Office of Personnel Management rather than the Department of Labor currently has enforcement authority under the Fair Labor Standards Act for executive branch agencies other than the Postal Service, for which the Labor Department does have jurisdiction, and for any unit of the legislative and judicial branches which has positions in the competitive service.

Under S. 272, OPM would also have the enforcement authority for all other legislative employees. There is a specific exception to such OPM coverage provided for in the Fair Labor Standards Act and retained in S. 272, whereby the Library of Congress enforces the Fair Labor Standards Act itself for its employees, pursuant to an agreement, a memorandum of understanding, with the Secretary of Labor.

Section 16(b) of the Fair Labor Standards Act, which provides a private right of action for employees against their employers in the courts, would also be applicable to the Congress under S. 272.

We have several comments with respect to S. 1165. First, the dispute resolution procedure specified in the bill would not itself offer adequate protection for every type of situation. One example would include the area of safety and health. If a dangerous condition exists, it should not be allowed to continue to exist even if one or more employees at a given workplace does not object—by filing a complaint—does not object to the danger.

Therefore, the mediation and conciliation procedure mandated by S. 1165 would be inappropriate, in our view, in this context to the extent that it would permit an employee to accept continuation of the hazardous condition.

As another example, the same principle would apply to the failure of an employer to make legally mandated overtime payments under the Fair Labor Standards Act. In both of these situations, we believe there is a vital and independent public interest in achieving compliance and neither OSHA nor the Fair Labor Standards Act ordinarily permit employees to waive these rights.

It is noted that Section 10(b) provides for remedies such as injunctive relief in "serious" cases upon a vote of the House of Congress in which the allegation occurs. It therefore appears to us that under the statute, even injunctive relief would be limited to the context of an active employee complaint. Even if Congress were to enforce employment standards itself, the legislation should make provision for achieving compliance beyond the relatively limited complaint-generated procedures now contained in S. 1165.

Another concern with S. 1165 is the absence of any specific indication of how interpretive or rulemaking authority is to be exercised and by what agency. Apparently, the office that would be created by the bill, the Office of Congressional Employee Relations, would make its own interpretations of the standards and principles of the specified laws. Such interpretations could create potential conflicts with the interpretations of the same statutes by other agencies. It is unclear in the bill what authority OCER interpretations would have in the courts if such other agencies were litigating cases based on their own interpretations.

A related point is that it is unclear whether the regulations promulgated pursuant to the specific statutes that currently exist are to be considered as part of the applicable standards and principles referred to under S. 1165. For example, the Rehabilitation Act of 1973 provides a broad framework, but it is the related regulations that provide the specific set of standards. Clarification as to whether such regulations are included under the bill would be beneficial, in our view.

Another point, which may be very technical in nature, is that S. 1165 does not specifically state that the Congress is to comply with the standards and principles of the applicable laws, but simply states that the Office of Congressional Employment Relations is to apply such standards and principles to legislative employees in adjudicating cases. Providing for the explicit application of the principles and standards to the Congress may clarify the intent of the Congress.

Finally, with respect to S. 1165, we have previously noted that the bill does not include the extension of collective bargaining protection to legislative branch employees as S. 272 does. While the Labor Department does not primarily administer the collective bargaining provisions of the Civil Service Reform Act of 1978, which is applicable to executive branch employees, we do enforce standards of conduct for labor organizations that represent Federal workers.

There are, of course, significant distinctions between the private sector and the Federal Government in terms of employee relations. Accordingly, under the Civil Service Reform Act, the permissible subjects for bargaining are much narrower than is the case in the private sector. In addition, Federal employees are prohibited from engaging in strike activity against the Government. The right of employees to decide whether to engage in collective bargaining is

nevertheless an important element of our basic national labor policy. Among other things, it can provide an appropriate framework for the achievement of mutually satisfactory solutions to difficult issues.

As I stated previously, we at the Labor Department would be pleased to offer our assistance to this Committee as you continue your consideration of these very important legislative proposals.

This concludes my prepared statement, Mr. Chairman, and at this time or after the other panel members have read their statements, I would be pleased to respond to any questions you might have.

Chairman GLENN. Thank you, Ms. Kramer. We appreciate it very much, and we will hold questions until we get everybody's testimony.

Chairman GLENN. Mr. Allen.

**TESTIMONY OF WILLIAM B. ALLEN, CHAIRMAN, U.S.
COMMISSION ON CIVIL RIGHTS**

Mr. ALLEN. Thank you, Mr. Chairman.

I will submit my testimony to the record¹ for you and confine myself to describing simply what it says to you.

Chairman GLENN. The entire statement will be included in the record. Thank you.

Mr. ALLEN. Thank you.

Let me at the outset pause to deliver a request from the Office of Management and Budget that I remind the Committee that neither the independent Commission on Civil Rights nor this Commissioner expresses the opinions of the Administration.

Chairman GLENN. All right.

Mr. ALLEN. I am very pleased that you have given us the opportunity to address this proposed legislation and pleased to have the opportunity to say that I think the strong language you have used in introducing it properly describes the urgency of the situation.

I also want to take the time to praise the Commission on Civil Rights, which in 1980 issued a report consequent to an agreement with Senator Leahy, entitled, "Extending Equal Opportunity Law to Congress,"² a report which I commend to your attention and which I believe sets forth most of the principal issues at stake in this discussion.

It is true, however, that in at least one of the proposed measures, you have gone much beyond making this a civil rights question or an equal opportunity question. I think that is critically important because it goes to the first question, namely, whether it is ever appropriate for the Congress to exempt itself from relevant, general legislation for the United States. My testimony takes up that issue, therefore, and sets forth what I take to be some of the principles involved in responding with a definite negative to that question.

I cite James Madison who, in "The Federalist Papers," explained why that should be, and let me just quote that brief passage from him, referring to the charges of Congressional omnipotence. He says: "They can make no law which will not have its full operation

¹ See p. 83.

² See p. 135.

on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rules and the people together. It creates between them that communion of interest and sympathy of sentiments of which few governments have furnished examples, but without which every government degenerates into tyranny."

On that principle, which Madison expressed so eloquently, I think we can all rapidly come to the conclusion that the direction in which you are headed is salutary for the United States. But it has raised certain questions, and I also discuss those questions, the most important of which is what role does the separation of powers play in this entire discussion. It has for years, of course, delayed action on the measure that you have proposed along with Senator Leahy and Senator McCain.

I am of the opinion that there is an erroneous view which holds that subjecting Congress to relevant general legislation exposes Congress to the inappropriate influence of the executive or judicial branches; and I set forth the reasons for that argument in my testimony.

The separation of powers, as you know, is not a doctrine which is elaborated in the Constitution of the United States. Like so many of the vital principles of republicanism, you find it mentioned not explicitly but rather, developed, elaborated in the context of debate through the ratification period. The meaning of separation of powers is therefore not strictly speaking a legal principle, either; indeed, such elements of the separation of powers as the presentment process were not brought to the attention of the court or at least interpreted until 1983, that long after the adoption of the Constitution.

It is rather a political/philosophical principle for which there are in fact few experts among us, and it seems to me that we might go back to the beginning and ask ourselves is it true that there is a separation of powers problem in bringing Congress under the same enforcement mechanisms to which all other Americans are subjected ordinarily. I happen to believe that there is not a problem with that.

I continue in my testimony after discussing those principles and suggesting a response therefore to some of the peculiar mechanisms established in S. 1165 and S. 262 to show why it is in some respects urgent that we change course if possible. And I wish to praise you particularly and the Senate as a body for already beginning to act in that spirit when it passed the Americans with disabilities proposal only last week, and in the process recognized the importance of extending its coverage to Congress. And while I would personally seek to extend the conversation of how coverage should be extended and why it is more important that Congress be subjected to the law than to the principles and standards of the law, which sets up a rather ambiguous difference between the two, I cannot end my testimony this morning without giving due praise for the fact that we have come this far. And, as I at least read the tea leaves, we stand ready finally to affirm the willingness to live by the rule of law.

Thank you.

Chairman GLENN. Thank you very much.

Mr. Troy.

TESTIMONY OF JAMES H. TROY, DIRECTOR OF PROGRAM OPERATIONS, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION¹

Mr. Troy. Thank you, Senator.

Like my two fellow panelists, we at the EEOC congratulate you and the Committee on moving forward in this direction.

My prepared statement draws a close comparison between the proposed legislation and the workings of the Federal complaint system, including a brief description of the Federal complaint system. But I wanted to say at the outset that my comments and those of the Commission are not designed nor intended to indicate a particular preference for either of the bills.

As you well know, our Federal complaint process is not one that is well liked by everyone. We don't find that the people who represent employees or people who represent managers are fully enamored by the process. It is overly complex, and it takes a long time. In fact, the Commission has moved toward changing those timeframes and correcting the problems that we have found in the current process, but that is the one that exists. My comments compare S. 1165 and S. 272 to each other and to the current procedures.

I want to say also that the Commission fully supports the concept of legislation requiring equal employment opportunity for legislative branch employees. I am sure you have heard before EEOC Chairman Clarence Thomas, who was a legislative assistant himself, say on several occasions that for equal employment opportunity and civil rights laws to have the appropriate clout and relevance in our society and throughout the Government, these laws must apply to Congress.

I want to comment briefly on both of the bills, and as I said, my prepared statement draws a more detailed comparison than I plan to make here. Of the two bills, we believe that S. 272 takes the more straightforward approach by amending cited statutes to provide coverage for legislative branch applicants and employees.

The bill, however, is silent regarding the methodology for processing these complaints. One must then assume that the intent of S. 272 is either to adopt the current Federal process or to leave the procedural questions open. And if the Federal system is adopted throughout the Congress, then the determinations under three of the cited statutes—title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and in some measures the Fair Labor Standards Act as it relates to equal pay for equal work will be subject to EEOC oversight.

Section 6 of S. 272, we believe, should be redrafted to include section 501 of the Rehabilitation Act rather than 504. Section 501 is the primary source of protection against discrimination on the basis of handicap for those Federal employees already covered.

Let me move to S. 1165. Our concerns with this bill primarily deal with omissions or lack of clarity in the drafting of the bill. For example, neither marital or parental status by themselves have been included in straight definitions of sex discrimination by any

¹ See p. 92 for Mr. Troy's prepared statement.

interpretation of title VII, and therefore would appear to be inconsistent with the references to the principles and standards as it relates to title VII.

Furthermore, the language, "to the greatest extent possible" suggests that parts of the principles and standards of the major statutes might not apply to legislative employees. Therefore, how does a member of Congress know beforehand whether a particular employment practice is subject to civil rights laws or not?

Under the Federal complaints processing system, if a complainant does not feel that he or she has received adequate redress, they may seek final adjudication by the courts. We believe this to be central to any system. We have learned perhaps the hard way that in order for a system to provide fair protection to all who work, there must be a certain degree of certainty and predictability about its processes and its outcomes.

We believe this, as I said, to be central to any system designed to evoke fair treatment. S. 1165 does not provide a mechanism for taking a claim outside of the body in which the claim is brought.

Sections 10(a) and 10(b) appear to establish two tiers of remedies when violations are found and make reference to "serious" as opposed to nonserious violations. We have several concerns in this regard. The law does not define violations as serious or nonserious. When you apply the antidiscrimination statutes, they make no distinction. These statutes require that a person who has been subjected to discrimination be made whole, regardless of the situation. The situation dictates the appropriate remedy, but in no context would we use that kind of terminology.

The award of monetary relief to discrimination victims is discretionary by congressional vote. Judicial decisions interpreting Federal EEO laws hold that victims will be made whole for monetary or other losses suffered due to discrimination. I guess I don't want to go into any kind of detail as I did with your staff as it relates to what we believe in this regard, but it seems to me that if you find discrimination, if you find a violation of law, you would not want to put it to a vote to the degree to which one person will be made whole after that violation is found. It seems to me that the best method would be to give the entity that makes the decision, that finds discrimination, the authority to effect appropriate remedy based on that finding.

Under current interpretations of the law, complainants are not entitled to monetary compensation for damages such as mental suffering or emotional distress. If S. 1165 contemplates such relief as we believe, then this would be much broader than the laws which you seek to apply.

You may wish to consider omitting the specific processing procedures from S. 1165. This may be more personal than anything else, but in my experience in administrative EEO enforcement for Federal employees and applicants since 1971, it is much better to set the mechanism in regulation or in law for procedures to be developed. Provide the authority for those procedures to be developed.

For example, in your timeframes, we had some concern about the quick timeframes that the proposed law would have. Our experience has been—and I am sure you are aware of this—between 1967 and 1979, we had a horrendous backlog; our average process-

ing time might have been two years. We have struggled long and hard to reduce that processing timeframe in our outside process, and we have it down now to almost 10 months, and we are still working to lower it.

If, for example, as the Congressman stated this morning, you get 25 cases a month, which is 300 cases a year, and you do not have adequate resources to process those cases within those timeframes, very soon you would build up a backlog. If the law set up the mechanism for such procedures to be established rather than the procedures themselves, then you would not have to go back to amend the law.

We thoroughly appreciate the opportunity to comment on these bills, and as I said, my prepared statement will go into detail regarding our feelings about the bills and our concerns surrounding the individual issues.

We do applaud the Senate's efforts to extend equal opportunity protection to Congressional employees and stand ready to assist in any manner that you may deem necessary.

Chairman GLENN. Thank you, Mr. Troy.

I will question as long as I can until the next set of buzzers and lights goes off, and then I will have to run over and vote on the floor; there is a vote on right now. So I'll get whatever questions I can in before I have to break to go vote, and then we'll take up the questions when I come back.

Mr. Troy, starting with some of your comments—there we go right now. We'll break right now. I am sorry. We will stand in temporary recess while I go vote.

Thank you.

[Recess.]

Chairman GLENN. The hearing will resume. Sorry for the interruption, but that's one of the problems around here, as you are aware.

I have a couple of questions. Ms. Kramer, on your comment about rulemaking and the interpretation by Congress, it would be our intention with this to interpret the rulemaking the same way it is interpreted for everybody else. We would not be putting our own spin on all these things to give a special advantage on Capitol Hill; that would not be our intention, certainly. But I think you are good to point that out, and I think it is right to point that out because it is something we would have to watch if this goes through and does become legislation.

Would we consider what the executive branch does with regard to enforcement of the rules—absolutely, because the purpose of this is to say that we are going to abide by the same rules and regulations and the same laws on Capitol Hill that the whole rest of the country is required to abide by, including the executive branch.

As far as the collective-bargaining process and things like that, we don't intend in this legislation to plow new ground or to create new legislation that would put on the legislative branch anything that is not applicable in another place. What we are trying to do with this is catch up, quite frankly, and just make the same laws that have applied across the country apply to us as well as to everyone else.

So it is good to point those things out and point out the problems involved there, and one that you are particularly concerned with at the Department of Labor. I just wanted to respond in that regard. I don't know whether you have any further comment on that or not.

Ms. KRAMER. If I might briefly, Mr. Chairman, on the rulemaking, the import of my remark was not at all to suggest any other intent on the part of Congress than what you just suggested, but merely to point out that, as you well know, very often the real enforcement of any Federal statute comes through rulemaking and definitions and refinements as to who is covered and who is not, and a lot of refinements. Our only concern there was that in writing definitions, in writing the contours of how these various laws would apply, that there could very well be with the best of intentions discrepancies between interpretations, for example, of the Fair Labor Standards Act by the Department of Labor as opposed to interpretations of that same statute by either Branch of Congress. Our only effort was to point that out and to suggest that that could create difficulties.

For example, if we were in an enforcement action at the Department of Labor under the Fair Labor Standards Act, arguing in court that a certain employer was exempt or not exempt, how would a court treat an inconsistent interpretation by that branch of the government which wrote the law? Obviously, your interpretation would be entitled to deference as well as ours would be. That could present a confusing situation.

On the second point on the labor-management relations, again our effort there was just to point out that on bill but not the other would extend the right to organize that Federal Executive Branch employees now enjoy to employees of Congress—again, not at all to suggest that you create rights that other people in this country do not currently enjoy, but only to point out that that is something that in the Executive Branch as well as in the private sector, employees to enjoy that right and would under one bill but not the other.

Chairman GLENN. Yes. Mr. Allen, you brought up the separation of powers, and I gathered from what you said that you feel that we should probably just let the legislative branch administer this to the Congress also; was that your view, or do I overstate that?

Mr. ALLEN. My view was that in at least S.1165, you are headed toward creating mechanisms under the control of the Congress for enforcement I believe out of a concern that you would otherwise expose Congress on the side of separation of powers. I think that that concern is not justified by the separation of powers properly understood, however much it may be justified by ordinary understandings of the separation of powers.

I would say, in a perfect world there is no reason that Congress could not be liable to the full enforcement mechanism of the executive branch and the courts, and I think in terms of the argument of separation of powers, there is reason to think that that is appropriate and preferable to anything else that might be done.

Chairman GLENN. OK. What you are dealing with there is the very thing that prevented us getting through any legislation back about 10, 11 years ago when I first put this thing in, because that was of paramount concern around here.

In an ideal world and with the proper motivations of everybody involved, I would agree with you completely, that if it is fair for everybody else to have the enforcement go under the executive branch banner, that's where it should go. But we work in a world where there are all sorts of suspicions, obviously, back and forth between the branches of government, and that was the thing that set up the opposition to this before. A President or a head of EPA or OSHA or whatever that had his or her own political vendetta that they wanted to exercise could bring charges against a specific Senate office or congressional office and enforce things on a piecemeal basis like that for political reasons. You may say, well, this isn't like to occur; well, it was considered likely enough that people had very serious opposition to our legislation years ago. And, having been around town here long enough to see some of these little political things happen back and forth, I don't rule that out.

Mr. ALLEN. Well, I think that you are wise to take it very seriously, Senator.

I might add, though, if I may take this moment to say so, two things. One, the report I mentioned to you from 1980 that the Commission prepared at Senator Leahy's request does discuss that issue at great length, and I think in the main, intelligently. I will include this with my testimony to the record to be sure you have access to it.

Chairman GLENN. Yes, we would like to have a copy of it here. I understand from staff we do not have one, and we should have that.

Mr. ALLEN. Secondly, I want to point out that there are some scenarios that we wouldn't ordinarily envision that nevertheless ought to command our attention. For example, our civil rights laws include additional civil procedures and make-whole relief, often criminal aspects as well, and one cannot readily imagine Congress providing separate provisions for criminal enforcement—and if one could, one would really have difficulty imagining the extension of them all the way up to the limits of a Presidential pardon, when otherwise you have set Congress completely aside from the ordinary governmental processes.

So there are really serious questions when we begin to try to exempt Congress from the ordinary operation of enforcement mechanisms. The separation of powers was meant not to separate the branches but to design their cooperative relationships such that the Government, this republican system, would work well when they worked together. So that for the people who make those arguments, I will take them seriously if I believe they are serious in making them and not just using an excuse, and when they are just using an excuse, I will defer to the wisdom of the members of this body, who know how to deal with excuses.

Chairman GLENN. OK. I, too, wish we lived in a perfect world. We are dealing with some realities here, pragmatic politics, as it goes back and forth between the branches of government, and I think that the way we have done this will be such a monumental step in catching up at least with what applies to the rest of the country that I'll be very happy to try it out this way, and then if we see that it works, or we can expand it later on in the direction you are talking about, maybe that is something we'd have to con-

sider at a later date. Right now, I am interested in getting this through on this basis.

Mr. Troy, you properly point out that there is no appeals process outside of congressional control on this, and you are right, and maybe that is something we have to look at, or look at in the future here, once we get this thing established.

I gather from Congressman Panetta's statement that they are getting most of these cases taken care of before they ever get any charges and things like that, and I think we would need to get a little experience on that to see whether we needed an appeals process.

It would seem to me that if we had some that were really unfair and were not taken care of properly by the panel or by the full Senate, that bringing those to public light and public attention in the media and so on would probably bring this to heel once this is in position. If not, maybe we have to go to some other appeals process outside.

I would think we'd still have the possibility of court remedies in this—I don't think those would be ruled out—we'd still have court remedies if people want to take it beyond the appeals process. We'll have to look at that, though, and it is a good thing to point out.

The appropriate remedy, as you point out, doesn't require that the complainant be made whole, but that is a matter of judgment on what is being made whole in most court situations, and I think we would have to take that into our panel, or the Senate itself would have to consider that in each particular case if it came to that. So these are good things to point out.

In the application of OSHA and civil rights legislation, where do we stand with the other thing you pointed out, on we don't provide for mental anguish and distress and compensation for those things? How are they applied in regular OSHA cases or civil rights cases? Mental anguish and distress and things like that—are they considered?

Ms. KRAMER. In the case of OSHA, Mr. Chairman, enforcement is by the Secretary through a citation procedure where the Secretary of Labor issues a citation to an employer who is alleged to have violated the safety or health provisions of OSHA. It is a penalty procedure, without recovery for any individual workers.

The only exception to that is there is a provision of OSHA in Section 11(c) of that statute which protects employees from retaliation for exercising their complaints under OSHA, for example, by filing a complaint with the Secretary of Labor, and that employee may not be fired or otherwise discriminated against for filing that complaint.

In that case, again, the enforcement action is brought by the Secretary of Labor, in that case in Federal District Court, and there would be a full panoply of rights available in the sense of reinstatement, if the employee is found to have been the victim of that kind of retaliation; reinstatement of the employee with some damages.

Chairman GLENN. OSHA mandates certain office space requirements. Are those enforced in the private sector?

Ms. KRAMER. I am not aware of office space requirements, but I will look at that.

Chairman GLENN. I thought we had a certain square footage per employee in offices that was supposed to be a minimum under OSHA. Is that correct, or do you know?

Ms. KRAMER. I'm honestly not aware of that, but I will look at that. As to the Federal sector, Federal Executive Branch employees, I believe that would be a matter of GSA regulation more than of OSHA and of OPM guidelines in terms of—

Chairman GLENN. Yes, staff tells me that that's an OPM regulation, not OSHA.

Ms. KRAMER. Yes. I think there are at least guidelines from OPM. I don't think they are particularly rigid, but an employee at a particular GS level is supposed to have a certain amount of square footage in office space.

Chairman GLENN. OK. Mr. Allen, do you consider the Senate rule prohibiting discrimination to be effective in light of the number of minorities and women in policy positions on Senate staffs?

Mr. ALLEN. We haven't done a recent survey at the Commission on Civil Rights. In the report that I previously mentioned, there is discussion of inadequacies in that regard a decade ago. Whether there has been improvement since the rule was adopted in 1979, we're not yet in a position to say.

Chairman GLENN. OK. I think I know what your reaction would be, but I wanted to ask you what your reaction would be about any other agency, not the legislative branch, but any other agency of government, either private sector or Federal, which had the same kind of numbers we have in the Senate—2 percent minorities and 18 percent women in policy positions.

I trust you'd be taking some action in this area.

Mr. ALLEN. We have characteristically been unhappy with such indications of a lack of attention to vital social needs.

Mr. TROY. May I speak to that? In preparation for this hearing, I spoke with your staff, and your staff gave us some numbers as they relate to policymaking positions in the Senate. If you compare those percentages with most Federal agencies, 90 percent of the Federal civilian employees work in 32 Federal agencies. So if you take the top 32 agencies in terms of size, the percentage of women in policy positions in the legislative branch would be higher than the percentage of women in those top 32 agencies in similar positions—similar positions being SES positions.

The other statistic that I saw was relative to two percent blacks in the Senate. That would be lower than 20 of the 32 largest agencies.

But it seems that you should separate, I believe, the idea about affirmative action and representation, which these numbers tend to imply, from acts of discrimination and providing remedy. Regardless of the numbers, if one has been discriminated against by a manager, then that individual must be made whole regardless of who is in the system, who is in the work force, or their relative positions therein.

Chairman GLENN. Just a general question addressed to any of you here. You have heard a recitation that I have given about three or four times this morning already of these six different acts that are on the books right now that we deal with in this legisla-

tion. Are there others that you think should be included in this that you know of? The ones that we have in the legislation right now are the Equal Pay Act, the Civil Rights Act of 1964, OSHA Act of 1970, the Age Discrimination Law of 1976, the Fair Labor Standards Act of 1938, which is basically minimum wage, and the Rehabilitation Act of 1973.

Are there others that you are aware of that we should consider including?

Ms. KRAMER. The only one that I would suggest Mr. Chairman, as we do point out in our testimony, is the one that is picked up by S. 272, but not S. 1165, the bargaining rights for employees—something akin to the Civil Service Reform Act.

Chairman GLENN. Well, you might want to think about that and give us a reply. I'd request that you look at that and give us a reply if you think of any additional ones that you think should be included so when we mark up this bill, we might want to consider those.

Mr. ALLEN. I would comment that you will find some others mentioned in the report, again, that I have indicated to you.

Chairman GLENN. OK.

Mr. ALLEN. And I would reiterate my concern that there is implicit a claim that citizens can raise to challenge all general legislation from which Congress exempts itself. And I think the real problem is for us to try to put an end to the process of Congressional exemption—and I realize the difficulty of that, but it seems to me that the very Constitutionality of such legislation is called into question.

Chairman GLENN. Oh, I don't disagree with you at all. I agree with you 100 percent, and that is basically the reason for this legislation. What we are trying to do is play catch-up here and get back in harmony with the rest of the country, with the executive branch and the rest of the country, in how these laws are applied. And I think that in future legislation, we have to be aware that every time we pass something, it is going to be a restriction or a requirement on the rest of the country that we include in that legislation also applies under whatever this legislation would wind up being, so that we don't find ourselves again having to put together a bunch of laws down the road 10 years from now, and once again let Capitol Hill catch up with the rest of the country. I agree with that.

Thank you very much. We may have additional questions for you, and we do have to move along. We have one more panel.

Ms. KRAMER. Thank you very much.

Chairman GLENN. Thank you.

Panel 3 includes Sharon Rodine, president of the National Women's Political Caucus, and Jackie Parker, chair of the Senate Black Legislative Staff Caucus.

Ms. Rodine, if you would lead off with your testimony, please, we would appreciate it.

TESTIMONY OF SHARON RODINE, PRESIDENT, NATIONAL WOMEN'S POLITICAL CAUCUS ¹

Ms. RODINE. Thank you, Senator Glenn.

My name is Sharon Rodine, and I am the President of the National Women's Political Caucus.

We are pleased to speak in support of the Congressional Fair Employment Practices Act that would make a variety of important anti-discrimination laws governing the executive branch and the private sector applicable to the U.S. Senate and the House of Representatives.

As has been indicated over and over this morning, this legislation is long overdue, and we applaud your efforts, Senator Glenn, in emphasizing the importance of this issue.

I am here today not only representing the women's community, but representing over 200 members of the Capitol Hill Women's Political Caucus. These are women who answer the phones in the offices, attend the hearings, plan the markups, do the research, prepare issues briefs, deal with constituents' concerns, and handle the list of other tasks so crucial to carrying out the work of the Senate and the House.

All of the Members of Congress know how much they rely on the women on their staffs to serve their constituents and the American public.

The Caucus is testifying today on behalf of those women, who should be able to use their Capitol Hill experience to advance their careers, not lock them in at the bottom of a pay scale in a dead-end position.

Is there a problem? You bet. It has been clearly outlined this morning. Both Representative Martin and Representative Oaker articulated the very real, once again, "plantation" mentality. That is a devastating portrait to paint of the Congress of the United States.

And certainly, as you indicated, the response you received when you initially used that phrase indicates it struck a chord.

Representative Martin's survey of pay levels for House staff employees in 1985 and 1988 indicated that the news was not good. She talked about the percentages. They are significant. And the figures from her 1985 survey varied only 1 or 2 percentage points from the survey she did 3 years later in 1988. So there is very little if any progress being made on its own.

Although no full survey has been conducted for the Senate, there is really little reason to believe that the figures would be any better.

From your own research, Senator Glenn, you have indicated that fewer than 25 percent of the top jobs in the Senate are held by women, and that black staff members account for less than 5 percent of the top policymaking jobs in the Senate.

The facts are clear. Women are clustered at the bottom of the pay scale on Capitol Hill. Top-level staff positions are held predominantly by males, and predominantly white males.

¹ See p. 104 for Ms. Rodine's prepared statement.

The House sought to rectify its staffing inequities this session by passing the Fair Employment Practices Resolution by a resounding vote of 408 to 12. Now the Senate has a chance to do the same and show its commitment to improving employees' rights.

This legislation could provide a real incentive for change. We want to see this bill work. We know your commitment to this issue, Senator Glenn, is very strong. We want this bill to have a real life impact, not just pass in principle and then not achieve the results you envisioned.

As written, S. 1165 would require the full House or Senate to vote on remedies, including not only the financial compensation but also injunctive relief. In reality, this would seriously reduce the interest of staff members who want justice but don't want the public notoriety which would make it difficult for them to realistically secure another job.

The Caucus would suggest that the review panel be permitted to institute remedies without floor votes, or at the very least, to institute injunctive remedies without floor vote. This would follow the pattern of the current fair practices resolution in the House—and after all, we are really not talking about an impeachment here.

Secondly, we suggest, as you just indicated, that this bill should apply not only to the six major civil rights and fair labor bills indicated, but to any future civil rights bills introduced in Congress. As your introduction of this landmark legislation clearly demonstrates, you understand the need to ensure civil rights protection for Congressional employees in all areas in which this protection is enjoyed by the general public. As protection for the general public expands, so should guarantees against discrimination for Congressional employees.

We urge all sponsors of future civil rights and labor legislation to make it standard practice to amend the legislation under consideration today to include the future protections. The legislation you have introduced, Senator Glenn, is living legislation and should grow as needed to grant all rights to Congressional employees that are enjoyed outside these halls.

The Congressional Fair Employment Practices Act is just that—fair. The laws that Congress establishes for the American people should be good enough for Congress itself. Double standards are no longer acceptable in the areas of employment or in the areas of legal protection.

The American people, as you well know, are increasingly concerned about the issues of ethics in Government. This bill would send a strong positive signal to the American people that when it comes to the employment of their own staff members, Congress will do what is fair, what is just, and what is ethically correct.

Capitol Hill staff members have a lot to gain with the passage of this bill; Congress has a lot to gain; the American people have a lot to gain. It is a win-win situation for everyone.

The Caucus applauds your leadership on this important issue. Thank you.

Chairman GLENN. Thank you very much.
Ms. Parker.

TESTIMONY OF JACKIE PARKER, CHAIR, SENATE BLACK LEGISLATIVE STAFF CAUCUS ¹

Ms. PARKER. Thank you, Senator Glenn.

Since 1979, I have served as legislative assistant to Senator Carl Levin of Michigan. Prior to that time, I served as chief legislative assistant in the U.S. House of Representatives to the late Congressman James A. Burke of Massachusetts. I am the current chair of the Senate Black Legislative Staff Caucus.

Much of my statement today represents my personal views as a longtime congressional employee and advocate for increased employment on Capitol Hill. My remarks are not intended to exclusively represent the views of the members of the staff caucus.

Thank you, Mr. Chairman, for giving me an opportunity to share some concerns relative to the underrepresentation of African Americans in the Congress, particularly in the Senate. On behalf of the black staffers in the Senate, I want you to know we appreciate your vision, your commitment, and your diligence in moving this issue. We admire your ability and that of your colleague, Senator Patrick Leahy of Vermont, to persist in the face of strong opposition and deafening indifference over the past 12 years. You have kept your eyes on what is required by simple justice.

I would also like to acknowledge the active support of Senate Majority Leader George Mitchell. He has taken the time to meet with us, to hear our concerns, and has committed to improving the status of blacks in the Senate.

My participation here today is not only an honor for our organization; it is historic. With no black members in the U.S. Senate, our caucus serves as a voice of black America in the Senate on matters of national concern. It is not a role we chose, and it is not a position we cherish. We are not here as a result of any popular vote. Instead, we are a policy voice of black America in the United States Senate by default. We represent the descendants of people who did not come here by choice.

Despite the fact that blacks represent more than 13 percent of the American population, we have seen only one of our own elected to this prestigious body of the people since the end of Reconstruction. We can find no pride in that historical note. And that reality makes our job different from that of our nonblack staff counterparts.

For many years, we have struggled with our role in the Senate. We have walked a delicate balance. On the one hand, serving as political and policy advisors in a capacity identical to our nonblack staff colleagues, but at the same time, we have the responsibility to assure that the Senators we serve are acutely aware of the impact of their decisions on the black community—even in instances where those Senators are not significantly influenced by a black voting population. Although the dual roles we play will remain difficult, your acknowledgement of our existence, Mr. Chairman, has in itself energized our ranks.

Unfortunately, those ranks are small. Despite the fact that black voters have demonstrated their ability to significantly affect the

¹ See p. 109 for Ms. Parker's prepared statement.

makeup of the Congress, blacks account for only 64 of the approximately 2,700 senior policy positions in the Senate. There are no black administrative assistants; only two black committee staff directors; one black deputy committee staff director; three black subcommittee heads; one legislative director; one black press secretary, and three black deputy press secretaries. Although these represent some progress, it is sad that this also represents the highest number of black policy advisers in the history of the U.S. Senate.

According to the Congressional Black Caucus, although 9 percent of the policy positions in the U.S. House of Representatives are held by blacks, that figure drops to only 3 percent once the payrolls of the 24 black Members are excluded. In a June 12, 1987 letter to his colleagues in the House, urging that they hire more blacks, Congressman Mervyn Dymally, then chairman of the Congressional Black Caucus, wrote:

There are over 12,290 employees in the House of Representatives, yet fewer than 3 percent are hired by nonminority members. While the pool of qualified blacks is significant, the record of hiring is disappointing. We have much to do in both Houses to bring aboard competent staff with a wide range of expertise in positions of significant and substantive responsibility.

The fact that the percentage of blacks employed in the Congress has remained somewhat stagnant during the past 20 years becomes particularly glaring when one considers that the pool of qualified applicants has expanded tremendously. Of the 400 résumés currently placed with the Senate Black Legislative Staff Caucus, 53 percent have law degrees, 30 percent have graduate degrees, and 10 percent have previous Hill experience.

Mr. Chairman, today you have given me an opportunity to share with you my views with respect to underrepresentation of black staffers in the U.S. Senate. I have used the bulk of my time to provide the Committee with an understanding of how current hiring promotion policies result in employment patterns that strongly disfavor blacks. Allow me please to take just a moment to make some specific suggestions about how this problem can best be addressed.

The current system of hiring depends largely on an informal network of contacts. Those who are in the communications loop have an opportunity to vie for open positions; those who are not a part of that network never know an opening exists. Such informal networks can have the same devastating effects as an explicitly discriminatory system since blacks are disproportionately out of the loop. This is particularly disappointing since many of our most ardent supporters in Congress, those members who are chief architects and unwavering proponents of civil rights legislation, have staffs who are chosen on this informal network basis and therefore have staff compositions that exclude blacks.

The bottom line, Mr. Chairman, is that there must be a moral decision or commitment to hire minorities. There is currently a closed-door process. The current atmosphere does not encourage, nurture or promote blacks as it does for young white professionals.

Thank you for this opportunity, Mr. Chairman. I am extremely grateful.

Chairman GLENN. Thank you very much.

Ms. Parker, on page 3 of your testimony, I was interested in the figures there. Those are very stark figures. No black administrative

assistants, and so on. Is there any correlation that has ever been made with what we require out in industry and business and how far this would depart from what we are now requiring across the country in any major business, because what we are doing here is taking legislation and trying to make what has applied only outside—off Capitol Hill, basically—we are trying to apply the same thing here.

Would this be a general pattern in business and industry, or is this much worse than the rest of the country in general? I know that is a difficult question, but can you give us any feel for that?

Ms. PARKER. Well, it is not so difficult, Senator. A while back, we took a look at outside industry, and we found that that was not the case in industry. Certainly, outside industry hasn't done as well as it could do, but Congress has done nothing in this area.

Chairman GLENN. Yes, but do you think that business and industry across the country, whether you are working for IBM or General Motors or somebody else, that this kind of situation would not be in existence there now? In other words, are we worse off than the rest of the country on average right now?

Ms. PARKER. We are certainly worse off, Senator.

Chairman GLENN. We are.

Ms. PARKER. Yes.

Chairman GLENN. OK. Does this very fact discourage a lot of good people who are minorities from coming and even seeking employment in the Government and on Capitol Hill?

Ms. PARKER. No, it has not, Senator. There has been outreach on behalf of our caucus and some Members of the Senate over the past several years, and as a result of that, in addition to extensive press coverage, more and more blacks have come to the Hill and applied for positions in the Senate. So there is not a lacking of applicants for positions here.

Chairman GLENN. In some of the press reports—I notice some of the people reporting on this in the room right now—different people have written on it—for the Cox Newspapers, Tom Price; Dave Hess, of Knight-Ridder, who is with us; and Simeone Booker, of Jet Magazine—both did surveys of the personal staffs of U.S. Senators, and they found that a majority of the Senate employed no blacks in upper-level policy-influencing positions, which is also what you said.

Are both these surveys pretty close to what your group has discovered? And another factor—some 70 Senators employ no blacks in policy-influencing positions—is that a correct figure?

Ms. PARKER. It has changed somewhat since those articles were written. There have been an additional four or five Senators that now have blacks in policy-influencing positions. And there are two committees that have additional staff in policy positions—which is still deplorable, Senator.

Chairman GLENN. Yes.

Ms. Rodine, you think we should shoot for remedies without floor votes. I was interested in that comment because ordinarily we think the higher uphill you push this, the more visibility you get and the less likely it is to have problems beyond that particular point if people know it is going to get pushed for a vote on the Senate floor, perhaps.

You felt that maybe that would be a discouragement, I gather, from filing any suit or filing a violation——

Ms. RODINE. It would to me.

Chairman GLENN [continuing]. Because of possible future employment, things like that.

Ms. RODINE. And just the public notoriety that goes along with it. It would to me, it would be a discouragement. And also, I just don't know if that is the most appropriate use of the full House or Senate time in looking at every individual case and situation here. It would seem that there would be other ways that would follow, perhaps, more standard personnel practices. You don't have a grievance go before a whole board of directors in a corporate situation. There are other ways that are appropriate where you have the input from all important parties involved, but not necessarily the full governing body.

Chairman GLENN. Well—staff, correct me if I am interpreting the fine print wrong—but my understanding of what we have done on this is that we would go for a remedy on the Senate floor probably in the extreme case—I suppose we could in any violation—but ordinarily, that would only occur where there was money involved.

We felt that to just give a panel unlimited, unbridled money authority—let's take an extreme case here, just to make a point. Let's say they awarded somebody \$1 billion out here someplace for whatever the remedy was—and I know that is not going to occur, but to make the point. You don't want money authority here where people may be a little free if they know they have a blank check, and it is automatically in law that whatever they adjudicate in their wisdom for that particular person and violation, automatically in law has to be backed up by the Appropriations Committee. That is a little bit hard.

So we thought that they could make recommendations, but where money was concerned as a recompense for whatever the violation was, you would have to go to the Senate and have a vote on that. So that would be the only case I would see—and I think that is the correct interpretation.

Ms. RODINE. Well, I would suggest that instead of basing your procedures an extreme situation, it would be more useful to set a policy that you think would be most efficient and most effective in serving that whole process. If that doesn't work, then, I think as the Representative was saying earlier, set up what you think is going to be a workable process for you, and if there are some kinks, work those out on down the line. But I think the review panel and the people you would select would certainly be responsible in their adjudication of the situation.

Chairman GLENN. Well, I think they would, too, and I know what we intend with this. But if someone else were proposing this, and I hadn't been into it in the depth that I have been into it, I would hesitate to vote a blank check where any panel could commit the Senate and the appropriations process to "x" amount of money without me knowing what that "x" amount of money is.

Ms. RODINE. I see what you're saying. Perhaps Congress could set some guidelines in terms of the compensation and allow the panel to work within those guidelines in setting compensation levels.

Chairman GLENN. OK. It might be; I don't know. Anyway, that is one thing to be considered here.

Your point about applying future laws that may occur, to have this also added as standard practice—I commented on that earlier—my intent would be to be vigilant in the future that if we get this passed, we also would just make it standard practice that where some things like these laws were put into effect in the future, they would automatically come under this requirement for Capitol Hill.

Ms. RODINE. Absolutely, and that's terrific.

Chairman GLENN. I think that would be great.

Also, as I understand it, you have just been elected Chair of the National Women's Political Caucus. I think we owe you our congratulations on that.

Ms. RODINE. We just changed the title so I am the first president they have had instead of a chair. Thank you.

Chairman GLENN. We look forward to working with you on this bill as well as other legislation which will come before this Committee.

Ms. RODINE. Thank you.

Chairman GLENN. Thank you both very much. We may have followup questions on this that other members or the staff or myself may wish to submit to you. We hope you could respond to those so they could be included as part of the record.

I want to place into the record also Senator Leahy's statement¹ and two charts that we have from our Committee's survey.² We will have those included in the record this morning, too.

The hearing will stand in recess subject to the call of the Chair.

Thank you very much.

[Whereupon, at 11:48 a.m., the Committee was adjourned.]

¹ See p. 120.

² See p. 133.

APPENDIX

101ST CONGRESS
1ST SESSION

S. 272

To eliminate the exemption for Congress from the application of certain provisions of Federal law relating to employment, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 3), 1989

Mr. LEAHY introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To eliminate the exemption for Congress from the application of certain provisions of Federal law relating to employment, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That it is the purpose of this Act to eliminate the exemption
4 for the Congress or for the Federal Government, as the case
5 may be, in the provisions of Federal law described in this
6 Act.

7 EQUAL EMPLOYMENT OPPORTUNITY

8 SEC. 2. Section 717(a) of the Civil Rights Act of 1964
9 is amended by striking out "in those units of the legislative
10 and judicial branches of the Federal Government having posi-

1 tions in the competitive service" and inserting in lieu thereof
2 "in all units of the legislative branch of the Federal Govern-
3 ment, and in those units of the judicial branch of the Federal
4 Government having positions in the competitive service".

5 **LABOR-MANAGEMENT RELATIONS**

6 **SEC. 3.** Paragraph (3) of section 7103(a) of title 5,
7 United States Code, is amended by inserting " , any unit of
8 the legislative branch" before " , the Library of Congress".

9 **FAIR LABOR STANDARDS; EQUAL PAY**

10 **SEC. 4.** Section 3(e)(2)(A)(iii) of the Fair Labor Stand-
11 ards Act of 1938 is amended to read as follows:

12 " (iii) in any unit of the legislative
13 branch of the Government, or in any unit of
14 the judicial branch of the Government which
15 has positions in the competitive service,".

16 **AGE DISCRIMINATION IN EMPLOYMENT**

17 **SEC. 5.** The second sentence of section 11(b) of the Age
18 Discrimination in Employment Act of 1967 is amended by
19 inserting before the period a comma and the following:
20 "except the term 'employer' does include the United States
21 for each unit of the legislative branch of the Federal
22 Government".

23 **QUALIFIED HANDICAPPED INDIVIDUALS**

24 **SEC. 6.** The first sentence of section 504 of the Reha-
25 bilitation Act of 1973 (29 U.S.C. 794) is amended by insert-
26 ing before the period the following " , or any program or ac-

1 tivity conducted by any unit of the legislative branch of the
2 Federal Government."

3 OCCUPATIONAL SAFETY AND HEALTH

4 SEC. 7. (a) Section 3(5) of the Occupational Safety and
5 Health Act of 1970 is amended by inserting after "United
6 States" the following: "(except the term 'employer' does in-
7 clude the United States for each unit of the legislative branch
8 of the Federal Government)".

9 (b) Section 3(6) of such Act is amended by inserting
10 before the period the following: ", and the employees of any
11 unit of the legislative branch of the Federal Government shall
12 be deemed to be employed in the business affecting commerce
13 for the purpose of this Act".

14 EFFECTIVE DATE

15 SEC. 8. The amendments made by this Act shall become
16 effective thirty days after the date of enactment of this Act.

17 SHORT TITLE

18 SEC. 9. This Act may be cited as the "Fair Employ-
19 ment in Congress Act".

101ST CONGRESS
1ST SESSION

S. 1165

To provide for fair employment practices in the Senate and the House of Representatives.

IN THE SENATE OF THE UNITED STATES

JUNE 13 (legislative day, JANUARY 3), 1989

Mr. GLENN (for himself and Mr. McCAIN) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To provide for fair employment practices in the Senate and the House of Representatives.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Congressional Fair
5 Employment Practices Act".

6 **SEC. 2. PURPOSES.**

7 The purposes of this Act are to—

8 (1) apply the standards and principles of certain
9 Federal civil rights, labor, safety, and health laws to
10 congressional employees; and

4 SEC. 3. NONDISCRIMINATION IN CONGRESSIONAL EMPLOY-
5 MENT.

(b) APPLICATION OF PRINCIPLES AND STANDARDS OF
FEDERAL CIVIL RIGHTS, LABOR, SAFETY, AND HEALTH
LAWS TO CONGRESSIONAL EMPLOYEES.—In carrying out
the functions of this Act, the Office of Congressional Employ-
ees Relations and the panels established under this Act shall,
to the greatest extent applicable, apply to each congressional
employee the principles and standards of—

19 (2) the Fair Labor Standards Act of 1938 (Pub.
20 Law 75-718, chapt. 676; 52 Stat. 1060);

21 (3) the Age Discrimination in Employment Act of
22 1966 (Pub. Law 90-202; 81 Stat. 602);

23 (4) the Occupational Safety and Health Act of
24 1970 (Pub. Law 91-596; 84 Stat. 1590); and

1 (5) the Rehabilitation Act of 1973 (Pub. Law 93-
2 112; 87 Stat. 355).

3 (c) INTERPRETATIONS.—Interpretations under subsec-
4 tion (a) shall reflect the principles of current law, as generally
5 applicable to employment.

6 (d) CONSTRUCTION.—Subsection (a) does not prohibit
7 the taking into consideration of—

8 (1) the domicile of an individual with respect to a
9 position under the administrative, legislative, and cleri-
10 cal assistance allowance; or

11 (2) the political affiliation of an individual with re-
12 spect to a position under the administrative, legislative,
13 and clerical assistance allowance or a position on the
14 staff of a committee.

15 SEC. 4. PROCEDURE FOR CONSIDERATION OF ALLEGED VIO-
16 LATIONS.

17 The procedure for consideration of alleged violations of
18 section 3 consists of three steps as follows:

19 (1) Step I, counseling and mediation, as set forth
20 in section 6.

21 (2) Step II, formal complaint, hearing, and review
22 by the Office of Congressional Fair Employment Prac-
23 tices, as set forth in section 7.

24 (3) Step III, final review by review panel, as set
25 forth in section 8.

1 SEC. 5. ESTABLISHMENT OF OFFICE OF CONGRESSIONAL EM-
2 PLOYEES RELATIONS.

3 There is established an Office of Congressional Employ-
4 ees Relations (hereafter in this Act referred to as the
5 "Office"), which shall carry out functions established under
6 this Act. Employees of the Office shall be appointed by, and
7 serve at the pleasure of, the Chairmen and ranking minority
8 party members of the Review Panel of the House and
9 Senate, acting jointly, and shall be under the administrative
10 direction of the Secretary of the Senate and Clerk of the
11 House of Representatives, acting jointly. The Office shall be
12 located in the District of Columbia and shall begin operation
13 not more than 30 days after the date of the enactment of this
14 Act. The Office shall adopt rules by which the functions
15 established under this Act are carried out.

16 SEC. 6. STEP I: COUNSELING AND MEDIATION.

17 (a) COUNSELING.—An individual aggrieved by an al-
18 leged violation of section 3 may request counseling by coun-
19 selors in the Office, who shall provide information with re-
20 spect to rights and related matters under such section. A
21 request for counseling shall be made not later than 180 days
22 after the alleged violation and may be oral or written, at the
23 option of the individual. The period for counseling is 30 days.
24 The Office may not notify the employing authority of the
25 counseling before the beginning of mediation or the filing of
26 the formal complaint, whichever occurs first.

1 (b) **MEDIATION.**—If, after counseling, the individual de-
2 sires to proceed, the Office shall attempt to resolve the al-
3 leged violation through mediation between the individual and
4 the employing authority.

5 **SEC. 7. STEP II: FORMAL COMPLAINT, HEARING AND REVIEW**
6 **BY THE OFFICE OF CONGRESSIONAL EM-**
7 **PLOYEES RELATIONS.**

8 (a) **FORMAL COMPLAINT AND REQUEST FOR HEAR-**
9 **ING.**—Not later than 15 days after the end of the counseling
10 period, the individual may file a formal complaint with the
11 Office. Not later than 10 days after filing the formal com-
12 plaint, the individual may file with the Office a written re-
13 quest for a hearing on the complaint.

14 (b) **HEARING.**—The hearing shall be conducted—

15 (1) not later than 10 days after filing of the writ-
16 ten request under subsection (a), except that the Office
17 may authorize a delay of not more than 30 days for
18 investigation;

19 (2) on the record by a duly authorized employee
20 of the Office representing the panel of the respective
21 House of the Congress of employment; and

22 (3) to the greatest extent practicable, in accord-
23 ance with the principles and procedures set forth in
24 sections 555 and 556 of title 5, United States Code.

1 (c) **DECISION.**—Not later than 20 days after the hear-
2 ing, the Office shall issue a written decision to the parties.
3 The decision shall state the issues raised by the complaint,
4 and shall contain a determination as to whether a violation of
5 section 3 has occurred.

6 **SEC. 8. STEP III: FINAL REVIEW BY REVIEW PANEL.**

7 (a) **IN GENERAL.**—Not later than 20 days after issu-
8 ance of the decision under section 7, any party may seek final
9 review of the decision by filing a written request with the
10 Office. The final review shall be conducted by a panel consti-
11 tuted at the beginning of each Congress and composed of
12 members representing each House of the Congress as
13 follows:

14 (1) three members of the Senate, appointed by the
15 majority leader of the Senate to be members of the
16 Senate panel;

17 (2) three members of the House of Representa-
18 tives, appointed by the Speaker of the House of Repre-
19 sentatives to be members of the House panel;

20 (3) three members of the Senate, appointed by the
21 minority leader of the Senate to be members of the
22 Senate panel; and

23 (4) three members of the House of Representa-
24 tives, appointed by the minority leader of the House of
25 Representatives to be members of the House panel.

1 If any member of a panel withdraws from a particular
2 review, the appointing authority for such member shall
3 appoint another member to be a temporary member of the
4 panel for purposes of that review only. Each panel shall
5 select a chairman from among the members serving on the
6 panel.

7 (b) REVIEW AND DECISION.—The review under this
8 section shall consist of a hearing (conducted in the manner
9 described in section 7(b)(3)), if such hearing is considered nec-
10 essary by the panel, and an examination of the record, to-
11 gether with any statements or other documents the panel de-
12 termines necessary. A majority of those present and voting
13 shall be necessary to overturn a decision by the Office. The
14 panel shall complete the review and submit a written decision
15 to the parties and to the Senate or House of Representatives,
16 as appropriate, not later than 30 days after filing of the
17 request under subsection (a).

18 SEC. 9. RESOLUTION BY AGREEMENT.

19 If, after a formal complaint is filed under section 7, the
20 parties resolve the issues involved, the parties shall enter into
21 a written agreement, which shall be effective—

22 (1) in the case of a matter under review by the
23 Office under section 7, if approved by the Office; and

24 (2) in the case of a matter under review by a
25 panel under section 8, if approved by the panel.

1 SEC. 10. REMEDIES.

2 (a) The Office or a review panel, as the case may be,
3 may order monetary compensation, to be paid from the con-
4 tingent fund of the Senate or the contingent fund of the
5 House of Representatives. Such compensation may only be
6 paid upon a recommendation by the panel and a vote by a
7 majority in the appropriate House of the Congress relating to
8 the complaint.

9 (b)(1) In the case of a serious violation, in addition to
10 compensation under subsection (a) the following remedies
11 may also be appropriate:

12 (A) Injunctive relief.

13 (B) Costs and attorney fees.

14 (C) Employment, reinstatement to employment, or
15 promotion (with or without back pay).

16 (2) Actions under paragraph (1) may be taken only after
17 a majority vote in the House of the Congress in which the
18 allegation occurs.

19 SEC. 11. COSTS OF ATTENDING HEARINGS.

20 An individual with respect to whom a hearing is held
21 under this Act shall be reimbursed for actual and reasonable
22 costs of attending the hearing, if the individual resides outside
23 the District of Columbia.

1 SEC. 12. PROHIBITION OF INTIMIDATION.

2 Any intimidation of, or reprisal against, any person by
3 an employing authority because of the exercise of a right
4 granted under this Act is a violation of section 3.

5 SEC. 13. CLOSED HEARINGS AND CONFIDENTIALITY.

6 All hearings under this Act shall be closed. All informa-
7 tion relating to any procedure under this Act is confidential,
8 except that a decision of the Office under section 7 or a deci-
9 sion of a review panel under section 8 shall be published, if
10 the decision constitutes a final disposition of the matter.

11 SEC. 14. EXCLUSIVITY OF PROCEDURES AND REMEDIES.

12 The procedures and remedies under this Act are exclu-
13 sive except to the extent that the rules of the Senate, the
14 rules of the House of Representatives, the rules of the Senate
15 Committee on Ethics, or the rules of the House Committee
16 on Standards of Official Conduct provide for additional proce-
17 dures and remedies.

18 SEC. 15. DEFINITIONS.

19 As used in this Act—

20 (1) the term “employing authority” means a Sen-
21 ator, an elected officer of the Senate, a Member of the
22 House of Representatives or an elected officer of the
23 House of Representatives with the power to appoint
24 the employee;

25 (2) the term “employment position” means, with
26 respect to the Congress, a position the pay for which is

1 disbursed by the Secretary of the Senate or the Clerk
2 of the House of Representatives and any employment
3 position in a legislative service organization or other
4 entity that is paid through funds derived from the ad-
5 ministrative, legislative, and clerical allowance;

6 (3) the term "Member of the House of Represent-
7 atives" means a Representative in, or a Delegate or
8 Resident Commissioner to, the Congress; and

9 (4) the term "Senator" means a Senator in the
10 Congress.

JOHN MCCAIN
ARIZONA

United States Senate

WASHINGTON, DC 20510

STATEMENT OF SENATOR JOHN MCCAIN
SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
LABOR PROTECTION FOR CONGRESSIONAL EMPLOYEES
THURSDAY, SEPTEMBER 14, 1989

MR. CHAIRMAN, I appreciate the opportunity to speak on behalf of the current pending legislation, S. 1165, which you and I cosponsored, addressing Congressional employment practices. Legislation in this area is long overdue, and this hearing is an important step toward ending a double standard of inappropriate Congressional privilege, and ending Congress' stubborn insistence on being the "last plantation."

The double standard that exists here is no more defensible than apartheid. We cannot continue to support maintaining one set of rules of privilege for ourselves -- the elite, powerful, minority -- and a set of far more restrictive rules for the remaining majority of society. It is time that Congress live under the rules she so freely imposes on others.

Before I continue, however, let me commend the Chairman of this committee, Mr. Glenn, for his commitment in this needed area and for all of his hard work on S. 1165. Let me also thank Senator Leahy for his work on S. 272, which also seeks to focus attention on this problem.

Mr. Chairman, at the end of last session, I introduced legislation that was designed to secure the rights of Senate employees. That measure would have banned discrimination in the Senate based on sex, race, religion, age, or handicap. Similar legislation was also introduced in the House.

At that time, Senator Glenn expressed an interest in expanding this measure into a comprehensive bill to cover all of Congress and not just the Senate. That was a good idea. Together, we crafted S. 1165, a bill that will apply to all congressional employees the principles of the Civil Rights Act of 1964, the Age Discrimination In Employment Act of 1976, the Fair Labor Standards Act of 1938, the Occupational Safety and Health Act of 1970, and the Rehabilitation Act of 1973.

Mr. Chairman, I believe that the members who serve in Congress have made every effort to comply with the laws that Congress has passed. However, there can be no room for cases of legal discrimination here on Capitol Hill. Discrimination cannot be tolerated in any environment.

(over)

There is no justifiable reason to exempt Congress from these labor practices that we felt were so important to mandate for the rest of the country. Congressional employees deserve the same protection as any other citizen of our nation. It is blatantly hypocritical for us to impose standards on the nation and then consciously choose to exempt ourselves.

For some time, critics of applying such standards to Congress have argued that the Constitution clearly mandates a separation of powers, and Congress must be made exempt from nondiscrimination bills in order to avoid a constitutional dilemma. Critics maintained that it is the duty of the executive branch to enforce the laws of the land and including Congress under the nondiscrimination laws would give the executive branch control over Congress.

By creating a Congressional Employees Relations Office, S. 1165 solves any constitutional problem. Any alleged violations of the labor standards would be dealt with by the office. Final authority would lie with a review panel consisting of House and Senate members. Any monetary awards granted would have to receive approval of the full House and Senate.

Further, this bill allows Members to continue to have discretion in hiring their personal staffs. This measure imposes no restrictions on Members who might choose their staff solely from their home state. In addition, no provision of this measure would prohibit a Member from hiring a completely partisan staff. These individual options are preserved under this bill.

Public perception of Congress as an institution is at an all time low. Mark Twain once said, "It could probably be shown by facts and figures that there is no distinctly native American criminal class except Congress." It is unfortunate that in the eyes of the public, this quote is now more true than ever. Continuing to exempt Congress from the fair labor standards it passes only further erodes the confidence of the American people.

Last week the Senate passed the Americans With Disabilities Act to protect the civil rights of the disabled in this country. The Senate rightly, I believe, included itself under the provisions of that bill. We must now apply all the civil rights and fair labor standards to Congress.

If Congress believes that measures it passes are truly worthy, then they must apply to Congress. We must remedy the glaring disparity that now exists. The two bills before the Committee today are necessary not only to help restore public confidence in the Congress, but because it is the fair and right thing to do.

I thank the Committee for this opportunity to testify on this important subject, and urge my colleagues to support these needed measures.

LYNN MARTIN
16TH DISTRICT, ILLINOIS
COMMITTEE ON RULES

Congress of the United States
House of Representatives
Washington, DC 20515

WASHINGTON ADDRESS
SUITE 1214
LONGWORTH HOUSE OFFICE BUILDING
PHONE (202) 225-6678

DISTRICT OFFICES
150 NORTH 4TH STREET
ROCKFORD, IL 61107
PHONE (815) 967-4326

420 AVENUE A
STERLING, IL 61081
PHONE (815) 826-1616

STATEMENT OF REPRESENTATIVE LYNN MARTIN
BEFORE THE SENATE COMMITTEE
ON GOVERNMENTAL AFFAIRS

SEPTEMBER 14, 1989

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, I THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY TO DISCUSS AN ISSUE ABOUT WHICH I FEEL VERY STRONGLY.

OVER THE PAST SEVERAL YEARS I HAVE WORKED CONSISTENTLY IN THE HOUSE IN SUPPORT OF LEGISLATION WHICH WOULD ACCOMPLISH THE PRIMARY OBJECTIVE OF THE LEGISLATION THIS COMMITTEE NOW HAS UNDER CONSIDERATION: TO EXTEND TO EMPLOYEES OF THE LEGISLATIVE BRANCH OF THE FEDERAL GOVERNMENT THE SAME RIGHTS AND PROTECTIONS WHICH THE LAWS OF OUR NATION - PASSED BY THIS BODY AND ENFORCED BY THE JUDICIARY - GUARANTEE TO WORKERS IN THE PRIVATE SECTOR.

IN BOTH THE 99TH AND 100TH CONGRESSES I SPONSORED LEGISLATION - THE CONGRESSIONAL AND JUDICIAL EQUAL EMPLOYMENT OPPORTUNITY ACT - TO AMEND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 FOR THE PURPOSE OF

EXTENDING COVERAGE UNDER THAT TITLE TO EMPLOYEES AND APPLICANTS FOR EMPLOYMENT IN THE LEGISLATIVE AS WELL AS THE JUDICIAL BRANCH OF THE FEDERAL GOVERNMENT. I HAVE RECENTLY AGAIN INTRODUCED THAT LEGISLATION AND, AS IN PREVIOUS YEARS, IT HAS RECEIVED SUBSTANTIAL BIPARTISAN SUPPORT.

BEFORE COMMENTING ON THE LEGISLATION BEFORE THE COMMITTEE - S.1165, SPONSORED BY SENATORS GLENN AND MCCAIN, AND S.272, SPONSORED BY SENATOR LEAHY - I WOULD LIKE TO COMMENT BRIEFLY ON WHY I THINK THE OBJECTIVES TOWARD WHICH THEY AIM ARE SO IMPORTANT AND WHY I APPLAUD THE COMMITTEE FOR FOCUSING ITS ENERGIES UPON THEM.

FIRST, AND MOST SPECIFIC, IS THE ISSUE OF FAIRNESS AND JUSTICE FOR THE MANY THOUSANDS OF MEN AND WOMEN WHO WORK WITHIN THE LEGISLATIVE BRANCH OF THE FEDERAL GOVERNMENT.

OVER THE PAST SEVERAL DECADES A NUMBER OF VERY MAJOR PIECES OF LEGISLATION HAVE BEEN ENACTED WHICH PERTAIN TO LABOR STANDARDS AND FAIR EMPLOYMENT PRACTICES. PERHAPS MOST HISTORIC OF ALL IN THIS RESPECT WAS THE CIVIL RIGHTS ACT OF 1964 - SPECIFICALLY TITLE VII OF THAT ACT WHICH PROHIBITS DISCRIMINATION IN EMPLOYMENT BASED UPON RACE, COLOR, RELIGION, SEX, HANDICAP, NATIONAL ORIGIN, OR AGE IN EMPLOYMENT.

THE ONE GROUP TO WHOM THE PROVISIONS OF TITLE VII - OR ANY OF THE OTHER RELATED LEGISLATION - DO NOT APPLY IS COMPRISED OF THE EMPLOYEES OF THE CONGRESS OF THE UNITED STATES, WHICH DRAFTED AND PASSED THOSE LAWS, AND THE EMPLOYEES OF THE FEDERAL JUDICIARY WHICH HAS SOUGHT TO ENFORCE THEM. ON ITS FACE THIS OMISSION IS UNFAIR AND INDEFENSABLE.

THE FACT THAT MOST MEMBERS OF THIS INSTITUTION AND THE JUDICIAL BRANCH ARE FAR TOO HONORABLE TO EVEN CONSIDER INTENTIONALLY DISCRIMINATING AGAINST AN EMPLOYEE, OR THAT INTERNAL RULES ENCOURAGE COMPLIANCE WITH THE STANDARDS ESTABLISHED IN FEDERAL LAW, DOES NOT JUSTIFY THIS OMISSION OR GUARANTEE AGAINST DISCRIMINATION.

WHEN I WAS A MEMBER OF THE ACCOUNTS SUBCOMMITTEE OF THE HOUSE COMMITTEE ON ADMINISTRATION I FOUND, FOR EXAMPLE, THAT THERE EXISTED A LARGE AND PERVASIVE WAGE DIFFERENTIAL BETWEEN MALE AND FEMALE CONGRESSIONAL COMMITTEE STAFFERS. A STUDY I DID ON PAY EQUITY AT THE TIME INDICATED THAT 81% OF THOSE COMMITTEE STAFFERS EARNING \$20,000 OR LESS A YEAR WERE FEMALE, WHILE 70% OF THOSE EARNING \$40,000 OR MORE WERE MALE.

WAS THIS INTENTIONAL OR PLANNED DISCRIMINATION? PROBABLY NOT. MORE LIKELY IT WAS JUST THE CARRYING ON OF BUSINESS AS USUAL. WAS IT NONETHELESS SYSTEMATIC AND DISCRIMINATORY? ABSOLUTELY. THOUGH A

MORE RECENT SURVEY OF THE COMMITTEE SALARY STRUCTURE SUGGESTS AN IMPROVEMENT OVER THE PAST FEW YEARS, THE LEGAL FOUNDATION WHICH WOULD MAKE THESE IMPROVEMENTS SECURE AND PERMANENT IS NOT IN PLACE.

THE LEGISLATION UNDER CONSIDERATION WON'T GUARANTEE THAT LEGISLATIVE EMPLOYEES WILL IN ALL CASES BE TREATED FAIRLY AND EQUITABLY - NO LEGISLATION CAN INSURE THAT DISCRIMINATION WILL NOT OCCUR. IT CAN, HOWEVER, ASSURE THAT EMPLOYEES WHO HAVE BEEN, OR SUSPECT THEMSELVES TO HAVE BEEN UNFAIRLY TREATED HAVE APPROPRIATE LEGAL RECOURSE AND THAT THOSE WHO DISCRIMINATE WILL NOT BE ALLOWED A FREE RIDE. THAT IS WHAT THE LAW PROVIDES TO ALL OTHER WORKERS IN AMERICA AND IT'S WHAT IT SHOULD PROVIDE TO CONGRESSIONAL EMPLOYEES AS WELL.

IN ADDITION TO THE QUESTION OF FAIRNESS TO CONGRESSIONAL EMPLOYEES, THE LEGISLATION WE ARE CONSIDERING ADDRESSES A BROADER AND MORE FUNDAMENTAL ISSUE, THAT BEING THE NATURE OF THIS INSTITUTION'S RELATIONSHIP TO THE LAW. FOR BETTER THAN 200 YEARS AMERICA AND AMERICANS HAVE LIVED UNDER LAW. CONGRESS HAS LIVED ABOVE IT. NONE OF THE MANY LAWS WE HAVE PASSED, OR REGULATIONS WE HAVE INSPIRED, APPLIES TO US AS AN INSTITUTION.

CONGRESS WAS INSTRUMENTAL IN CREATING AN OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION WHICH HAS ESTABLISHED MYRIAD RULES AND REGULATIONS WITH WHICH EMPLOYERS ACROSS THE LAND MUST CONFORM. WE

ARE EXEMPT. WE HAVE PASSED EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION LAWS TO COMBAT RACIAL DISCRIMINATION IN THE WORKPLACE. AGAIN, WE ARE EXEMPT. LAST YEAR IT WAS ESTIMATED THAT OF 2,500 SENIOR POLICY STAFF MEMBERS IN THIS CHAMBER, ONLY 61 WERE BLACK. WOULD SUCH A SITUATION GO UNCHALLENGED WERE IT BROUGHT TO LIGHT IN THE PRIVATE SECTOR? WE'RE IN THE MIDST OF A PUBLICLY AND POLITICALLY CHARGED BATTLE OVER MINIMUM WAGE REFORM. YET, THE MORE THAN 15,000 PEOPLE WHO WORK FOR CONGRESS WILL NOT BE LEGALLY PROTECTED. THE ETHICS IN GOVERNMENT LAW DOESN'T APPLY TO CONGRESS. THE LIST GOES ON.

AS MY HOUSE COLLEAGUE FROM ILLINOIS, HENRY HYDE, HAS SAID. "CONGRESS WOULD EXEMPT ITSELF FROM THE LAWS OF GRAVITY IF IT COULD."

THE CONGRESSIONAL TRADITION OF "DO AS I SAY BUT NOT AS I DO" HAS CONTRIBUTED TO THE GENERAL AND VERY DANGEROUS EROSION OF RESPECT FOR THIS INSTITUTION AND BELIEF IN ITS CREDIBILITY. THE LEGISLATION BEFORE THE COMMITTEE WOULD ADDRESS ONE SMALL BUT SIGNIFICANT PART OF THIS LARGER PROBLEM.

IN ADDRESSING THESE VERY IMPORTANT ISSUES IT'S UNAVOIDABLE THAT WE ENGAGE TWO DEBATES. THE FIRST DEBATE IS FAIRLY CUT AND DRIED. IT IS BETWEEN THOSE WHO BELIEVE WE NEED TO DO SOMETHING AND THOSE WHO

BELIEVE WE DO BEST BY LEAVING WELL ENOUGH ALONE. I AM PLEASED TO SAY THAT IN THE HOUSE, AT LEAST, WE'VE CLEARED THIS PRIMARY HURDLE.

I OFTEN HEARD IT ARGUED IN THE HOUSE THAT PLANS TO BRING THE LEGISLATURE UNDER FEDERAL FAIR EMPLOYMENT STATUTES WERE INAPPROPRIATE AND WOULD ULTIMATELY PROVE UNWORKABLE BECAUSE OF THE FUNDAMENTALLY POLITICAL NATURE OF CONGRESSIONAL OFFICES. THE RISK OF, AND THE VULNERABILITY TO, POLITICALLY MOTIVATED CHARGES OF DISCRIMINATION, OR THE SPURIOUS COMPLAINTS OF EMPLOYEES WHOSE DISSATISFACTION WAS UNRELATED TO UNFAIR OR ILLEGAL TREATMENT, WERE MOST OFTEN CITED.

THE RISKS AND VULNERABILITIES CANNOT BE DENIED. IT HAS ALWAYS APPEARED CLEAR TO ME, HOWEVER, THAT WITH OR WITHOUT APPLICATION OF THESE LAWS MEMBERS OF CONGRESS ARE SUBJECT TO THESE RISKS AND VULNERABILITIES. THEY CANNOT BE ALTOGETHER AVOIDED. THEY MIGHT, HOWEVER, BE MITIGATED.

I SUSPECT, IN FACT, THAT IF A MORE APPROPRIATE SOUNDING BOARD THAN THE PRESS HAD BEEN AVAILABLE TO DISSATISFIED EMPLOYEES, OUR LABOR RELATIONS PROBLEMS WOULD HAVE BEEN HANDLED WITH A GREAT DEAL LESS FANFARE AND PERSONAL GRIEF AND EMBARRASSMENT THAN HAS UNFORTUNATELY BEEN THE CASE IN THE PAST. LIKE EVERYONE ELSE, LAWMAKERS WOULD BE PROTECTED, AS WELL AS OBLIGATED UNDER THE LAW.

THE SECOND DEBATE THAT WE MUST ENGAGE IS EVIDENT IN THE TWO DISTINCT APPROACHES WHICH S.272 AND S.1165 TAKE. IT IS A DEBATE BETWEEN MEMBERS WHO AGREE THAT WE NEED TO ADDRESS THIS ISSUE BUT DISAGREE AS TO HOW: DO WE CHANGE CONGRESSIONAL RULES, AS S.1165 PROPOSES, OR DO WE AMEND FEDERAL LAW, AS WOULD BE THE CASE WITH ENACTMENT OF S.272?

THOUGH I REPEAT THAT I APPLAUD THE EFFORTS AND SINCERE INTENTIONS BEHIND EACH OF THESE BILLS, MY OWN PREFERENCE HAS BEEN AND REMAINS FOR THE LATTER APPROACH.

S.1165, SPONSORED BY CHAIRMAN GLENN AND SENATOR MCCAIN, IS NEARLY IDENTICAL IN ITS APPROACH AND IN ITS SPECIFIC PROVISIONS TO LEGISLATION WHICH PASSED IN THE HOUSE LAST YEAR. THOUGH I PARTICIPATED DIRECTLY IN DRAFTING THAT LEGISLATION, ALONG WITH MY COLLEAGUES ON THIS PANEL, I DO NOT BELIEVE, AS I STATED THEN, THAT IT OFFERS A WHOLLY SATISFACTORY RESPONSE TO THE PROBLEM.

RATHER THAN AMENDING FEDERAL LAW TO ELIMINATE THE CONGRESSIONAL EXEMPTION FROM COVERAGE, S.1165 WOULD CREATE AN INTERMEDIARY BODY WITHIN THE LEGISLATURE TO APPLY THOSE LAWS. THE SENATE WOULD REMAIN, AS THE HOUSE IS NOW, ONE STEP REMOVED FROM RESPONSIBILITY UNDER THE LAW AND SENATE EMPLOYEES, LIKE THEIR HOUSE COUNTERPARTS, WOULD REMAIN ONE STEP REMOVED FROM PROTECTION UNDER THE LAW. NEITHER THE SPECIFIC QUESTION OF EMPLOYEE RIGHTS, NOR THE LARGER

QUESTION OF CONGRESSIONAL EXEMPTION, IN MY VIEW, IS ADEQUATELY ADDRESSED.

A RULE IS NOT THE SAME AS A LAW AND, MORE IMPORTANT AND MORE TO THE POINT, CURRENT ARRANGEMENTS IN THE HOUSE, AND THE ARRANGEMENTS BEING PROPOSED IN S.1165, DO NOT PROVIDE EMPLOYEES ADEQUATE RECOURSE IN THOSE CASES WHERE DISCRIMINATION DOES OCCUR OR IS SUSPECTED. ONE CLEAR PROBLEM WITH THIS APPROACH IS THAT MEMBERS OF THE HOUSE AND SENATE, ALONG WITH DESIGNATED MEMBERS OF THEIR STAFFS, WOULD REMAIN THE FINAL ARBITERS IN CASES BROUGHT BY LEGISLATIVE EMPLOYEES AGAINST MEMBER OFFICES. I BELIEVE THAT IF THE REVIEW AND ADJUDICATION PROCESS IS TO BE CREDIBLE AND LEGITIMATE, OBJECTIVE AND IMPARTIAL REVIEW MUST BE ASSURED BEYOND ANY SHADOW OF A DOUBT.

SENATOR LEAHY'S BILL, S.272, IS SIMILAR IN APPROACH THOUGH NOT IN ALL ITS PARTICULARS TO THE CONGRESSIONAL AND JUDICIAL EQUAL EMPLOYMENT ACT WHICH I HAVE SPONSORED. IT AMENDS FEDERAL LAWS RELATING TO EMPLOYMENT AND THEREBY BRINGS THE CONGRESS OF THE UNITED STATES UNDER THOSE LAWS.

IT PLACES UPON US AS EMPLOYERS THE SAME RESPONSIBILITIES THAT WE, AS LEGISLATORS, HAVE PLACED UPON EMPLOYERS IN THE PRIVATE SECTOR. AT THE SAME TIME, IT PROVIDES OUR EMPLOYEES THE SAME PROTECTIONS THAT WE HAVE PROVIDED TO OTHER AMERICANS.

IN THE HOUSE, ADVOCATS OF ADDRESSING THIS ISSUE VIA CHANGES IN INTERNAL RULES RATHER THAN THROUGH AMENDMENTS TO EXISTING FEDERAL LAW HAVE OFTEN CITED CONCERNS RELATED TO THE SEPARATION OF POWERS AND SPEECH OR DEBATE CLAUSES OF THE CONSTITUTION. THOUGH I AM NOT A LAWYER OR A LEGAL SCHOLAR, I AM CONFIDENT AFTER HEARING FROM MANY EXPERTS IN THIS AREA THAT LEGISLATION CAN BE ENACTED WHICH DOES NOT COMPROMISE EITHER OF THESE PRINCIPLES.

IN SHORT, I BELIEVE STRONGLY THAT WE MUST GO BEYOND MERELY AMENDING THE INTERNAL RULES OF THE LEGISLATURE AND GUARANTEE, IN LAW, THAT OUR EMPLOYEES ARE PROVIDED THE SAME PROTECTIONS AGAINST DISCRIMINATORY OR OTHERWISE UNFAIR OR IMPROPER TREATMENT ON THE JOB AS ARE PROVIDED TO OTHER AMERICANS.

AS WE PREPARE IN THIS CONGRESS TO ADD TO AN ALREADY LONG AND IMPRESSIVE LIST OF LEGISLATIVELY MANDATED REMEDIES FOR SOCIAL AND ECONOMIC ILLS, IT IS ONLY RIGHT AND HONORABLE THAT WE UNEQUIVOCALLY COMMIT OURSELVES TO ABIDE BY THE LAWS WE ESTABLISH. THE CONGRESSIONAL TRADITION OF "DO AS I SAY BUT NOT AS I DO" IS A DETRIMENT TO THE CREDIBILITY AND INTEGRITY OF THE CONGRESS. IT IS THE ULTIMATE AND MOST TRANSPARENT HYPOCRACY TO TELL OTHERS WHAT TO DO WHILE EXEMPTING ONESELF. THAT HYPOCRACY MUST END.

AGAIN, LET ME CONGRATULATE THE COMMITTEE FOR ITS EFFORTS, AND COMMEND THE CHAIRMAN FOR HIS LEADERSHIP ON THIS ISSUE.

MARY ROSE OAKAR
9TH DISTRICT, OHIO

WASHINGTON OFFICE
2331 Rayburn House Office Building
Washington, DC 20515
(202) 225-5871

DISTRICT OFFICE
822 Federal Court Building
215 Superior Avenue
Cleveland, OH 44114-1281
(216) 522-4927

**Congress of the United States
House of Representatives
Washington, DC 20515**

COMMITTEES
BANKING, FINANCE
AND URBAN AFFAIRS
CHAIR, SUBCOMMITTEE ON
ECONOMIC STABILIZATION
POST OFFICE AND CIVIL SERVICE
SELECT COMMITTEE ON AGING
CHAIR, TASK FORCE ON SOCIAL
SECURITY AND WOMEN
COMMITTEE ON HOUSE
ADMINISTRATION
CHAIR, SUBCOMMITTEE ON PERSONNEL
AND POLICE
JOINT COMMITTEE ON
THE LIBRARY
WORK AT LARGE

STATEMENT OF:

THE HONORABLE MARY ROSE OAKAR (D-OH)

**BEFORE THE SENATE COMMITTEE ON
GOVERNMENTAL AFFAIRS**

HEARING ON:

S. 1165 AND S. 272

**THURSDAY, SEPTEMBER 14, 1989
9:30 A.M.
ROOM 342 DIRKSEN BUILDING**

Good Morning Chairman Glenn and Members of the Committee on Governmental Affairs. I would like to take this opportunity to thank you for inviting me to testify before your committee on S. 1165, the legislation you and Senator McCain introduced, "to provide for fair employment practices in the Senate and the House of Representatives," and S. 272, a bill introduced by Senator Leahy, "to eliminate the exemption for Congress from the application of certain provisions of Federal law relating to employment."

I would like to commend Chairman Glenn and Senators McCain and Leahy for the leadership they have taken on the important issue before us--the issue of fairness for our Congressional employees.

As you may recall, last October, under the able leadership of Chairman Panetta, the House passed H. Res. 558, the "Fair Employment Practices Resolution." This resolution, which applies basic civil rights protection to employees in the House of Representatives, was the product of contributions from several of our Colleagues who had authored employee protection legislation during the 100th Congress. Chairman Panetta had the difficult task of formulating a compromise among several differing views and beliefs on how best to provide civil and labor law

Page 2

protections for our House employees.

With the passage of H. Res. 558, each employee of the House of Representatives is now free from discrimination based on race, color, national origin, religion, sex, including marital or parental status, handicap or age. The legislation further provides a fair complaint and review process - the Fair Employment Practices Office - by which to enforce these rights. I believe that it reflects a sensitive balance between protecting the employee's rights and the Member's concern with unjust charges leveled against them.

The Office of Fair Employment Practices was created to counsel, mediate, investigate and hear alleged violations. A Review Panel was also established consisting of what I feel is a fair cross-section of individuals who can best represent the House of Representatives. The legislation provided that four Members from the Committee on House Administration (two Democrats and two Republicans), two House Officers appointed by the Speaker and two employees appointed by the Minority Leader are to serve on the Review Panel. Of course, Mr. Chairman, we must remember that this legislation has only recently been enacted. Time

Page 3

is the great measurer but "so far - so good". It is my feeling that staff are much more comfortable because the office exists. The Fair Employment Office is a valuable resource for them to air their concerns.

Mr. Chairman, the process you are proposing in the Senate bill to resolve complaints of violations of the anti-discrimination provision is identical to that which the House currently uses. I think it is both fair and judicial. I also agree with you, Mr. Chairman, on the idea of a joint House and Senate Fair Employment Practices Office. As Members of the House of Representatives and the Senate, we need to set an example to other employers by ensuring that our pay and personnel practices are free from discrimination. A joint office would add strength and commitment to our beliefs.

Since I became a member of the Committee on House Administration, I have been vocal in encouraging my committee and the House of Representatives to examine its personnel practices. As newly elected Chair of the Subcommittee on Personnel and Police, I am able to actively study the mechanisms that will ensure that the House of Representatives operates efficiently and at its greatest potential. As a

Page 4

member of the House Post Office and Civil Service Committee, and as former Chair of its Subcommittee on Compensation and Employee Benefits, I have been examining personnel practices within the Federal Government, with an emphasis on equitable pay and personnel practices.

The enactment of the legislation that created the House of Representatives' Fair Employment Practice Office was one step taken toward equity, accountability and fairness that we need to provide to our own employees in our own backyard. As legislators, it is our duty to set the example for others to follow. I look forward to working with all of you on this important issue, and again, I commend my Senator from Ohio, Chairman Glenn, and Senators McCain and Leahy for bringing this issue of fairness to the forefront.

TESTIMONY OF THE HONORABLE LEON E. PANETTA
COMMITTEE ON SENATE GOVERNMENTAL AFFAIRS
September 14, 1989

Mr. Chairman, I appreciate this opportunity to appear before your panel to discuss the issue of protecting basic rights for employees of the House and Senate.

As you know, a year ago the House passed the Fair Employment Practices Resolution, H.Res. 558. This measure applies basic Civil Rights protection to employees of the House of Representatives. It is the product of contributions by the authors of employee protection legislation introduced in the 100th Congress, including Chairman Gus Hawkins (H.R. 5060), Rep. Pat Schroeder (H.R. 4821), Rep. Lynn Martin (H.R. 4576) and Rep. Steve Bartlett (H.R. 4821).

Let me give you a brief summary of the resolution.

Protection Against Discrimination

- The resolution provides all House employees and applicants for employment with protection against discrimination based on race, color, national origin, religion, sex (including marital or parental status), handicap, or age. This prohibition does not prevent a Member from taking into account an individual's domicile or political affiliation in making employment decisions.

Office of Fair Employment Practices and Review Panel

- An Office of Fair Employment Practices (the Office) was created by

H.Res. 558 to counsel, mediate, investigate and hear alleged violations. Also established was a Review Panel made up of four members of the House Administration Committee (two Democrats and two Republicans), two House officers appointed by the Speaker and two minority employees appointed by the Minority Leader.

Process

- The process to resolve complaints of violations of the anti-discrimination provision involves three steps.

1. Counseling and Mediation:

An employee has 180 days from the time of an alleged violation to contact the Office of Fair Employment Practices to request counseling. The counseling period lasts for thirty days. At the end of the thirty day period the individual may proceed to mediation, which is also conducted by the Office.

2. Formal Complaint and a Request for a Hearing

Not later than 15 days after the end of the counseling period, the individual may file a formal complaint with the Office. This may be followed by a request for a hearing, which is on the record and which allows the individual to be represented. A written decision is issued by the hearing officer within 20 days after completion of the hearing.

3. Final Review by Review Panel

Either party may seek a final review by the Review Panel. The Review Panel will examine the record of the hearing by the Office, statements from the parties, and, if necessary, may hold its own hearing. After reviewing the record a written decision is submitted to both parties.

Remedies

- The remedy options provided by the resolution for application by both the Office and the Review Panel are:
 1. Monetary compensation, to be paid from the contingent fund of the House of Representatives, or from clerk-hire if a serious violation is found;
 2. Injunctive relief;
 3. Costs and attorney fees;
 4. Employment, reinstatement to employment, or promotion (with or without back pay).

The first step in this area was taken in March, 1988 when the Committee on House Administration adopted a procedure which provided similar protection to employees under the House Officers. This "Adverse Action Procedure" was created because of a commitment to authors of employee rights legislation in the 99th Congress to begin developing employee protection for the House of Representatives. A hearing held in August 1988 by the Personnel and Police Subcommittee on employee protection legislation marked the beginning of discussions on the next step: extending

protection to all House employees. Meetings and negotiations involving the authors of key legislation continued over the next six weeks and H. Res. 558 was the result.

There was a clear need for the establishment of an employee protection procedure in the House of Representatives. I also agree with you that the U.S. Senate could benefit from a similar procedure.

First, there is a basic issue of fairness raised when the House and Senate pass laws relating to employment which apply to the private sector and executive branch agencies but exclude the U.S. Congress. The House and Senate are unique institutions, but that is no reason to exempt them from those basic standards which we apply by law to other Americans. The Civil Rights Act, which the Fair Employment Practices Resolution reflects, was passed twenty-four years ago. It is time that the Congress adopt the basic civil rights protection which the rest of America has been enjoying for over two decades.

Secondly, lawsuits against Members of the House and Senate are possible because no internal procedure exists to remedy employee complaints of discrimination. With the H.Res. 558 procedure in place the courts will not accept jurisdiction of discrimination lawsuits by House employees.

Today the only alternative in these situations other than a lawsuit is to go the news media. But this option does not necessarily lead to a solution of a personnel problem. The Fair Employment Practices Resolution gives the employee time for counseling and mediation -- which will likely

resolve most cases. If the process continues to a hearing or to the Review Panel a written decision on the complaint will exist to establish the facts in the case.

Finally, without this procedure the pressure on the Congress will increase to adopt proposals which apply Federal employee protection laws to the Congress with enforcement by Federal agencies. Last year one proposal which could have resulted in the enforcement of the Fair Labor Standards Act by the Labor Department against the House of Representatives was adopted by the House Education and Labor Committee as part of the minimum wage amendments (H.R. 1834).

There are strong arguments based on the Constitution's speech or debate clause and the separation of powers doctrine that executive branch agencies should not be allowed to interfere with the essential functions of the legislative branch. The Fair Employment Practices Resolution places the responsibility of enforcement within the House of Representatives, thereby preventing executive branch interference and avoiding constitutional problems.

On October 4, 1988, the U.S. House of Representatives adopted H. Res. 558, the Fair Employment Practices Resolution and on November 3, 1988 the Office of Fair Employment Practices officially opened its doors. As part of the process to notify employees of the U.S. House of Representatives of the newly established office a notice was included with the February 1989 employee payroll checks. The personnel assigned to the Fair Employment Practices Office include a director, a counselor, a mediator, and a hearing

officer; and the members of the Review Panel are Representatives Joe Kolter, William Clay, Barbara F. Vucanovich, Pat Roberts, Clerk of the House Donn Anderson, House Doorkeeper Jim Malloy, Sue Forrest, and Alan Coffey.

The office has been active since its inception and averages 25 cases per month. I am pleased to say that most of the complaints filed are resolved through the counseling and mediation process. Frankly, because of the confidentiality we have built into the process I am not able to give you complete information on numbers of cases and their status within the fair employment practices procedure.

Mr. Chairman, I understand that your bill, S. 1165, the Congressional Fair Employment Practices Act, is closely modeled on H. Res. 558. Let me comment on two areas where it diverges.

First, the bill proposes a joint House-Senate fair employment office. While I believe this is an appropriate goal over the long-term, ideally the House Fair Employment Practices Office should operate for another year or so as established to allow orderly development of the mediation, counseling and hearing procedures. This is a difficult and sensitive task for the employees, and I would not like to see an entirely new office created before some basic practices and procedures have been perfected. You may want to consider setting up an office and a procedure for the Senate only, and after both offices have developed some expertise a joint office could be considered by House and Senate leadership. When a joint office is established the best of the House and Senate procedures could be combined.

Second, S. 1165 provides that the review panel consist solely of Members. Since the panel will be reviewing complaints from employees of the Congress I believe it is only fair to include some employee representation on the panel - H. Res. 558 provides for officers and employees of the House to be appointed to the review panel. There is also the possibility of a challenge to the fair employment procedures based on a constitutional due process argument if employees are not represented on the panel.

Finally, I understand that S. 1165 applies the Occupational Safety and Health Act of 1970 standards to Congress. The House Administration Committee would want to look closely at how this law would work in the congressional context before adopting it as part of the fair employment process.

Again, I want to commend you on your work on this important issue. H. Res. 558 was a very positive and long overdue step for the House of Representatives and I believe the U.S. Senate would benefit by having a similar process for Senate employees. I wish you success on S. 1165.

STATEMENT OF JUDITH E. KRAMER
DEPUTY SOLICITOR FOR PLANNING AND COORDINATION
OFFICE OF THE SOLICITOR
U.S. DEPARTMENT OF LABOR
BEFORE THE COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

September 14, 1989

Mr. Chairman and members of the Committee:

I wish to thank you for the opportunity to be here today to represent the Department of Labor at this important hearing. We are pleased that you are considering legislation that would extend basic nondiscrimination and labor standards protection to employees of the Legislative branch of our federal government. We understand that the Department of Justice will be providing additional views on this legislation in the near future.

The concepts of nondiscrimination in employment, a safe and healthy place to work and basic minimum wage and overtime protection have become part of the American landscape. Today, such concepts are broadly accepted as beneficial to employers, employees, and to the country as a whole. Providing protection for American workers is also a basic part of our mission at the Department of Labor.

We commend this Committee for taking on the task of considering legislation that would extend labor standards, that now protect so many American workers, to those who work for the Congress. We recognize that you will face some significant challenges in developing legislation in this area. The Department of Labor has had considerable experience in

administering programs of the type under discussion today, and we would be pleased to offer our assistance to you and your staffs in this important effort based on our experience.

From time to time, various approaches to the extension of labor standards to legislative branch employees have been proposed. As we understand it, your Committee is currently considering two specific bills. These bills are S. 272, the "Fair Employment in Congress Act" and S. 1165, the "Congressional Fair Employment Practices Act."

While these two bills have the same basic objectives, there are significant differences in their approaches.

S. 272 would, essentially, extend the protection of six specified statutes to employees of "units of the legislative branch." These statutes are: Title VII of the Civil Rights Act of 1964, the labor-management relations provisions of the Civil Service Reform Act of 1978, the Fair Labor Standards Act of 1938 (including its Equal Pay Act provisions), the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, and the Occupational Safety and Health Act of 1970.

On the other hand, S. 1165 does not actually amend existing nondiscrimination and labor standards laws. Instead, it would "to the greatest extent applicable, apply to each congressional employee the principles and standards of" five of the six laws listed previously. S. 1165 does not contain a reference to the labor-management relations provisions of the Civil Service Reform Act.

S. 1165 also contains an independent nondiscrimination provision.

Since S. 1165 would not invoke existing enforcement procedures, it establishes a new three-step complaint-generated procedure for considering alleged violations. The first step would involve conciliation and mediation. The second step would involve a formal complaint, hearing and review by a newly-established "Office of Congressional Employee Relations." The third step would involve final review by panels of Senators and Congressmen also to be established by the bill.

The approach taken in S. 272 would involve the most consistency in protection of congressional employees with employees in other sectors of the workforce, with respect to both remedies as well as substantive rights. S. 1165, by contrast, establishes a new enforcement mechanism that would be notably less rigorous than the enforcement procedures applicable to both the private sector and the Executive branch under the respective statutes.

Regardless of the overall question of basic approach, we have also identified certain specific aspects of these two bills which we believe should receive additional consideration.

Section 7 of S. 272 would provide that the Occupational Safety and Health Act of 1970 apply to the Legislative branch as if the Congress were a private sector employer. This would include imposing upon the Congress the full array of civil penalties that now apply to the private sector.

In its original enactment of OSHA, Congress made a judgment that it would be preferable to establish a different mechanism for applying OSHA standards to the federal government. Accordingly, section 19 of OSHA establishes a separate program to protect the safety and health of all federal workers. In general, each agency head is vested with the responsibility "to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with" OSHA standards. To implement this section, President Carter issued Executive Order 12196 and, in turn, the Secretary of Labor issued regulations to provide for the basic structure for such Federal programs. The regulations define "agency" as an agency in the Executive branch. However, since section 19 covers all federal employees, which would include employees of the Legislative and Judicial branches, the regulations also provide that by agreement between the Secretary of Labor and the head of an agency of the Legislative or Judicial branch the regulations may be made applicable to such agencies. While there have been no formal agreements executed with the Congress, OSHA has responded to requests for assistance in some specific matters involving the Legislative branch.

In general, under section 19 each agency, including those of the Legislative and Judicial branches, is required to establish its own safety and health program and to file an annual report with OSHA. OSHA has the responsibility of reviewing the reports and preparing an annual report to the President on the status of

federal sector safety and health. In the nearly twenty years since enactment of the OSHA statute, we have had considerable experience with the federal safety and health programs, especially as implemented by Executive branch agencies. In our view, this approach has worked effectively to provide a safe and healthy work environment for federal employees.

Section 4 of S. 272 would extend coverage of the Fair Labor Standards Act to all employees of the Legislative branch. It should be noted that the Office of Personnel Management currently has enforcement authority under the FLSA for Executive branch agencies (except for the Postal Service) and for any unit of the Legislative and Judicial branches which has positions in the competitive service. Under S. 272, OPM would also have the enforcement authority for all other legislative employees. There is a specific exception to such OPM coverage provided for in the FLSA, and retained in S. 272, whereby the Library of Congress enforces the FLSA itself for its employees pursuant to an agreement with the Secretary of Labor. Section 16(b) of the FLSA, which provides a private right of action for employees against their employers in the courts, would also be applicable to the Congress under S. 272.

We have several comments with respect to S. 1165. First, the dispute resolution procedure specified in the bill would not itself offer adequate protection for every type of situation. One example would include the area of safety and health. If a dangerous condition exists, it should not be allowed to continue

to exist, even if one or more employees at a given workplace does not object to the danger. Therefore, the mediation and conciliation procedure mandated by S. 1165 would be inappropriate in this context to the extent it would permit an employee to accept continuation of the condition. As another example, the same principle would apply to the failure of an employer to make legally-mandated overtime payments under the Fair Labor Standards Act. In both of these situations, we believe there is a vital and independent public interest in achieving compliance and neither OSHA nor the FLSA ordinarily permit employees to waive these rights. It is noted that section 10(b) provides for remedies such as injunctive relief in "serious" cases upon a vote of the house of Congress in which the allegation occurs. It therefore appears that under the statute even injunctive relief would be limited to the context of an active employee complaint. Even if Congress were to enforce employment standards itself, the legislation should make provision for achieving compliance beyond the relatively limited complaint-generated procedures now contained in S. 1165.

Another concern with S. 1165 is the absence of any specific indication of how interpretive or rulemaking authority is to be exercised and by what agency. Apparently, the Office of Congressional Employee Relations (OCER) would make its own interpretations of the standards and principles of the specified laws. Such interpretations could create potential conflicts with the interpretations of the same statutes by other agencies. It

is unclear what authority OCER interpretations would have in the courts if such other agencies were litigating cases based on their own interpretations.

A related point is that it is unclear whether the regulations promulgated pursuant to the specified statutes are to be considered as part of the applicable standards and principles. For example, the Rehabilitation Act of 1973 provides a broad framework, but it is the related regulations that provide the specific set of standards. Clarification as to whether such regulations are included would be beneficial.

Another point, which may be technical in nature, is that S. 1165 does not specifically state that the Congress is to comply with the standards and principles of the applicable laws but simply states that the OCER is to apply such standards and principles to legislative employees. Providing for the explicit application of the principles and standards to the Congress may clarify the intent of the Congress.

Finally, with respect to S. 1165, we have previously noted that the bill does not include the extension of collective bargaining protection to Legislative branch employees as S. 272 does. While the Labor Department does not primarily administer the collective bargaining provisions of the Civil Service Reform Act of 1978, we do enforce standards of conduct for labor organizations that represent federal workers.

There are of course significant distinctions between the private sector and the federal government. Accordingly, under

the Civil Service Reform Act, the permissible subjects for bargaining are much narrower than is the case in the private sector. In addition, federal employees are prohibited from engaging in strike activity against the government. The right of employees to decide whether to engage in collective bargaining is, nevertheless, an important element of our basic national labor policy. Among other things, it can provide an appropriate framework for the achievement of mutually-satisfactory solutions to difficult issues.

As I stated previously, we at the Labor Department would be pleased to offer our assistance to this Committee as you continue your consideration of these important legislative proposals.

This concludes my prepared statement. At this time, I would be pleased to respond to any questions you may have.



UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

TESTIMONY OF WILLIAM B. ALLEN

CHAIRMAN
UNITED STATES COMMISSION ON CIVIL RIGHTS

before the Committee on Governmental Affairs
United States Senate

September 14, 1989

Chairman Glenn, members of the Committee, it is a pleasure to come before you today to testify in support of a bill which would eliminate Congressional exemptions from our civil rights and other laws. Although I may at times appear to be fighting a rear guard action, raising questions that most have assumed to have been settled long ago, I view the problem before us as rather like the golfer who slices his tee shot out of bounds, and must tee up again. Corrective measures alone will not suffice here. Congress has been way out of bounds since initially it exempted itself from any of our laws. We must in this legislation tee up again, assess where we went wrong, and ensure that we stay this time on the fairway.

I should also say that, although my testimony before you today is mine and mine alone, it is not drawn from a vacuum of Commission positions on the subject. I commend to your attention the Commission's 1980 report entitled Extending Equal Employment Opportunity Law to Congress.

That report goes a long way toward answering lingering questions about the constitutionality of bringing Congressional employment practices somewhat under the review of the two other branches in the government. However, the recommendations in that report, and the process contemplated in the current legislation, are rather like patchwork corrective measures for a policy that is itself fundamentally flawed. The notion that Congress can exempt itself from any law was not contemplated at the time of the founding of this nation, nor have any of the several amendments to the Constitution given it such authority. However, the practice has been so in use now for this past half century that we are scarcely able to conceive of a challenge to the policy itself. It is on this point that I would like to begin, to see if we can find our way back to the tee box.

In 1787, during the debates over ratification of the Constitution, the authors of the Federalist Papers responded to a charge of congressional omnipotence thus:

they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny.

The notion that Congress would have the authority to make laws binding on the citizenry or on the executive branch of

government that were not equally binding on themselves was recognized as the very epitome of tyranny. The beauty of the constitutional system that the founders of this nation devised was that, unlike all other forms of government that had existed before, it did not contain such opportunity for abuse.

The question that should be asked is not "How do we bring Congress under the civil rights laws?" but "By what right did Congress exempt itself from these laws in the first place?" And I would not limit the question to the civil rights laws, but rather to the minimum wage laws, the OSHA laws, the pending Americans with Disabilities Act; indeed, to every law that Congress has ever duly passed.

You might object and ask, "Would not such a structure of laws enable the Executive to threaten the very existence of Congress, thereby destroying the separation of powers on which we have come to rely for the continued protection of our liberty?" This objection is based upon a faulty understanding of the separation of powers, which, far from requiring an absolute insulation of the branches from the influence of the others, actually works precisely by allowing the branches to interact one with another. Furthermore, there is no necessity here for Congress to fear, even in the event of a concerted executive attack upon it. Congress can always simply change or repeal the laws, either to clarify them so as to narrow the executive's prerogative in their enforcement, or to eradicate them from

the statute books. After all, if complying with a law is inconvenient and onerous for Congress, a fair conclusion might be that the same law is inconvenient and onerous for the rest of us.

Further, I cannot accept the argument that Congress should not trust the executive and the courts to apply the laws to its members with a prudence and discretion equal to that they employ with the people at large. Indeed, if anything the opposite should be feared; that the bureaucrats entrusted with enforcing civil rights laws in the several federal agencies would shrink from applying those laws with the appropriate rigor against the very congressmen who control their budgets, their jobs, and, by virtue of Congress' power of investigation, even their reputations and their freedom. And we all know how commonly members of the Congress resort to not-so-thinly veiled threats in order to get their way.

This latter difficulty, however, would never make it preferable for Congress to claim for itself the executive and the judicial, as well as the legislative, power, even when applied only to its own 38,000 employees. This part of the legislation would be a truly disconcerting and significant violation of the separation of powers which I would beg Congress to reconsider. Let me be clear: the present bill not only intends a separate law for Congress alone, but also would establish a purely congressional enforcement mechanism and judicial body. The latter body is

made "necessary" in part because the proposed bill purposes to "apply the standards and principles of certain Federal civil rights, labor, safety, and health laws to congressional employees" rather than the very laws themselves. The executive body established in Congress to ensure compliance will be allowed a great and undue measure of interpretation since "the principles and standards" of said laws shall be applied to "each congressional employee" under the mysterious qualification "to the greatest extent applicable."

The collapsing of the legislative, executive and judicial powers into the hands of Congress alone in this legislation, together with a vagueness of purpose and latitude of application, make Congress the very worst sort of judge in its own cause. There is no real law here, but merely an occasion for particular determinations to be made with respect to individual cases.

I would be remiss were I not now to turn to another problem not just with this legislation but with our civil rights laws generally. Since I have been at the Commission on Civil Rights, I have pressed for the need to review and recodify our nation's civil rights laws, to make a fine, consistent linen out of what is now an ungainly patchwork quilt. Just last month I described the process of writing civil rights laws as having a ratchet effect, where every year we seem to offer up a new provision for the benefit of some interest defined in the language of civil rights,

without ever stopping to take account, to vary the metaphor, of how the old bottle will affect the new wine. I expect the witnesses on the next panel will provide an example of what it is I mean. Sometimes the result of this piecemeal work has been direct contradiction, but more often than not mass confusion, in our laws.

Allow me to cite a few examples from the analysis of the pending legislation prepared by the Commission's General Counsel's office to elaborate:

The drafters [of S. 272] have apparently chosen to include Congress within the definition of employers set forth in § 630(b) [of the Age Discrimination in Employment Act of 1967, the ADEA], rather than include Congress within the exclusive provisions applicable to other covered Federal entities (§§ 631(b) and 633a). The effect of this scheme would be to create two distinct sets of ADEA procedures within the Federal government, one covering Congressional positions and another covering all other positions (including, possibly, positions in the LOC [Library of Congress] and the competitive service in the legislative branch).... Additionally, S. 272 would create conflicting ADEA statutory provisions by including "each unit of the legislative branch of the Federal Government" within the definition presently covering private and State employers (§ 630), while concurrently retaining the applicability of § 633a, concerning Federal government personnel practices, to positions in the legislative branch competitive service and the LOC. Since the procedures and remedies available under these two provisions are mutually exclusive, judicial interpretation [along] statutory construction principles would be necessary to determine the impact of S. 272 in the area of age discrimination.

The confusion with the section pertaining to the ADEA is not limited to the current legislation. The vast majority of the ADEA itself applies only to private or State employers, and not to the Federal government. Perhaps it would be well

to reconsider by what right Congress can exempt any of the branches of the Federal government from its laws while we are reconsidering whether it can exempt itself.

Another example is equally disconcerting:

With respect to the Rehabilitation Act, S. 272 includes Congress only within the scope of § 504 (29 U.S.C. § 794), which bars discrimination against qualified handicapped individuals by recipients of Federal financial assistance and by Federal executive agencies. The bill does not include Congress within the ambit of § 501 (29 U.S.C. § 791), which requires affirmative action programs in Federal executive agency employment of the handicapped.... Based upon technical interpretations of the relevant statutory language, there is a split of authority among the Federal circuit courts as to whether an employment discrimination suit can be filed under § 504 against the Federal government. The Seventh, Ninth and Tenth Circuits have answered this question in the negative, holding that § 501 provides the exclusive cause of action for plaintiffs alleging Federal employment discrimination on the basis of handicap.... Other courts have held to the contrary, allowing § 504 actions against a Federal employer.... The District of Columbia Circuit Court has not yet ruled on this issue, but has "strongly suggest[ed]" that plaintiffs seek relief under § 501 rather than § 504.... The circuits that do permit § 504 private causes of action against Federal employers have inferred the application of Title VII procedures (which expressly govern § 501 discrimination complaints).

By including itself within § 504 coverage and not that of § 501 [as Congress does in this legislation], it must be assumed that Congress has tacitly adopted the reasoning and holding of those courts recognizing § 504 suits against Federal employers. Otherwise, the absurd result is reached that Congress imposed chimeric statutory requirements on itself.

This, Mr. Chairman, is obviously no way to craft our civil rights, or any other, laws. With all due respect, I must observe that Congress created this mess. Accordingly, it is

only right that Congress should correct it. I can think of no better opening in this process than to recognize that laws that exempt Congress are themselves illegitimate.

Beyond the Constitutional objections to the practice of Congress' exempting itself from certain laws, there are practical objections as well. It is incumbent upon Congress to appraise not just the legitimacy but the effectiveness of its actions. For too long now we have relied upon sham hearings in ill-attended committee sessions to perform that task. The best, or at least the most apparent, indication of the effects of these laws would arise were Congress itself to suffer the regulatory burdens imposed by them.

Another story, if you will permit me, will paint a clear picture for you. My wife is a librarian in Claremont, California. Only last week she related to me a concern expressed at her library that library shelves higher than four feet should not be used to store books, because they would not be accessible to someone in a wheelchair. The pending Americans with Disabilities Act, approved overwhelmingly by this body only last week, would make that concern most vivid. Now, we can enact this law, and years from now hold oversight hearings on its enforcement and perhaps even on its effectiveness. In the meantime, however, libraries across the country that cannot afford to double their space will be subject to the penalty provisions in the ADA. Whether librarians burn half their books - which I really don't fear - or begin the radical change to

closed instead of open stacks in American libraries, I can think of no surer way for Congress quickly to realize the implications of its actions than for the Library of Congress to be no less subject to the requirements of the ADA than every other library in America.

Mr. Chairman, I have perhaps imposed more than I should have on the committee's time, but I find the subject raised by this legislation to be of sufficient magnitude to warrant the imposition. I applaud your willingness to enter this breach, but pray that you might be guided by the larger concerns I have raised as you proceed. In closing, allow me to return to James Madison's words in the 57th Federalist:

what is to restrain the [Congress] from making legal discriminations in favor of themselves and a particular class of society? I answer: the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and manly spirit which actuates the people of America -- a spirit which nourishes freedom, and in return is nourished by it. If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate anything but liberty.

STATEMENT OF JAMES H. TROY, DIRECTOR
OF THE OFFICE OF PROGRAM OPERATIONS,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
FOR THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
SEPTEMBER 14, 1989

I am James H. Troy, the Director of Program Operations, at the Equal Employment Opportunity Commission. Thank you for this opportunity to provide technical comments on S. 272 and S. 1165. We understand that the Department of Justice will be providing additional views on this legislation in the near future.

The Equal Employment Opportunity Commission supports the concept of legislation requiring equal employment opportunity in the legislative branch. Chairman Clarence Thomas on several occasions has communicated his support for applying equal employment opportunity laws to Congress. Clearly either S. 272 or S. 1165 would extend these protections to employees in the legislative branch. EEOC can think of no more appropriate recognition of the 25th Anniversary of Title VII of the Civil Rights Act of 1964, than extending its protections to all employees in the legislative branch.

The Office of Program Operations is responsible for implementing the commission's policies through 50 field offices which

investigate and resolve employment discrimination charges filed against private, state and local government employers, labor organizations and employment agencies. My office also provides managerial guidance to federal agencies as they establish and implement equal opportunity programs in affirmative action and federal complaints adjudication.

In the main, the only federal employees that enjoy the protections of major equal employment opportunity laws, i.e., Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963, and the Rehabilitation Act of 1973, are those in the executive branch. My comments will address the methods of complaint resolution implied in S.272 and identified in S.1165, in comparison to the processes currently in effect in the federal service.

S. 272

By simply amending the language of the major statutes, S.272 takes the more straight forward approach in providing coverage of these laws to legislative branch employees and applicants. However, because it contains no reference to any methodology or process to resolve employee and applicant concerns that are covered by these statutes, one must assume that the intent is to either adopt the current federal process or to leave procedural questions open.

Section 5 of S.272 would amend Section 11(b) of the ADEA to provide the necessary coverage. Section 11(b) of the ADEA defines terms of coverage in the private sector. Amending this section might imply that private sector procedures would apply to those who bring complaints based on age. Section 15 of the ADEA already relates to federal employment and therefore, might be a more logical point of amendment and would keep consistent the approach reflected in the Section 2 amendment to the Civil Rights Act of 1964.

Section 6 of S.272 should be redrafted to include Section 501 of the Rehabilitation Act, in addition to Section 504. Section 501 is the primary source of protection from employment discrimination on the basis of handicap for the federal employees and applicants that are already covered.

To address complaints processing issues under either S.272 or S.1165, I will briefly state the provisions of federal complaint regulations. These are the procedures that we assume would be established if S.272 is approved in its current form.

o **PRE-COMPLAINT COUNSELING**

An employee or applicant for employment must bring the matter complained of to the attention of an Equal Employment Opportunity (EEO) counselor at the agency where he or she works or applied for employment. The aggrieved person must consult the counselor within 30 calendar days of the date of the alleged discriminatory act, or,

within 30 calendar days of that action's effective date. The EEO counselor inquires into the facts and attempts to informally resolve the claim of prohibited discrimination. In most agencies, counselors are peer employees who complete this function as a collateral duty.

o **FILING A COMPLAINT**

The aggrieved person may file a formal complaint in writing with the agency within 15 calendar days of receipt of a written notice of final interview with the EEO counselor. Failure to file within 15 days will result in rejection of the complaint unless the agency extends the time limit. The aggrieved person may also file a formal complaint with the agency without having received the written notice of final interview, if the matter has not been resolved within 21 calendar days after first contacting the EEO counselor.

o **ACCEPTING OR REJECTING A COMPLAINT**

The agency must promptly accept or reject the complaint. If the agency rejects or cancels the complaint, the aggrieved person is notified in writing of their right to file an administrative appeal to the Equal Employment Opportunity Commission or of their right to file a civil action in federal district court.

o **INVESTIGATING THE COMPLAINT**

The investigation includes a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of the aggrieved person as compared to similarly situated individuals, and any work related policies and practices which may constitute discrimination. The investigator obtains documentary evidence, including affidavits from the aggrieved person and witnesses, and copies of, or extracts from records, policy statements and/or regulations of the agency.

o **INFORMAL ADJUSTMENT OF THE COMPLAINT**

At this point, the agency has completed its investigation and it attempts to informally settle the charge.

o **PROPOSED DISPOSITION OF THE COMPLAINT**

If the agency is unable to secure an informal settlement with the charging party, it notifies the complainant in writing of its proposed ruling on his or her complaint. The complainant has the right to request a formal hearing conducted by EEOC after being informed of the proposed disposition. The complainant must notify the agency within 15 calendar days of receipt of the letter of proposed disposition. Otherwise, the agency will issue its final decision without a hearing.

o HEARING AND RECOMMENDED DECISION

When a timely request has been made, the EEOC administrative judge conducts a hearing and makes a recommended finding to the agency of discrimination or no discrimination. The hearing is essentially a device which completes an investigation of a complaint by ensuring that the parties have a fair and reasonable opportunity to explain, supplement, or comment on the work of the investigator. It is an opportunity for the aggrieved person to have his/her allegations heard and to have a neutral trier of fact adjudicate the claim of discrimination. The commission's administrative judge hears relevant testimony and considers documentary evidence about the allegations. Witnesses give testimony under oath and can be cross-examined. The EEOC administrative judge submits findings and a recommended decision to the head of the charged agency.

o AGENCY'S FINAL DECISION AFTER HEARING

The agency issues its final decision either accepting, modifying, or rejecting the EEOC's recommended decision. The final decision is accompanied by a verbatim transcript of the hearing, a copy of the administrative judge's recommended decision, and notification of complainant's rights to appeal to the EEOC Office of Review and Appeals (ORA) and/or to file a civil action in federal district court.

o APPEALING TO THE EEOC

The aggrieved person can appeal the agency's final decision to the EEOC's Office of Review and Appeals within 20 calendar days of receipt of the agency's decision. ORA, acting as an appellate tribunal, then issues a decision which is binding upon the parties unless subsequently reversed by the federal courts.

Since this mechanism is already in place for federal employees and applicants, we assume that S. 272, absent any mechanism for procedural development, would apply these procedures to complaints by legislative employees and applicants.

S. 1165

S.1165 at Section 3(a) defines sex as including marital or parental status. Language at Section 3(b) indicates that to the "greatest extent applicable" the bill intends to "apply to each congressional employee the principles and standards of. . . . the Civil Rights Act of 1964. . . ." Three threshold concerns are raised regarding the extent to which the bill provides the coverage it intends.

First, neither marital nor parental status by itself has been included in the definition of sex discrimination under any interpretation of Title VII. Therefore, this inclusion in Section 3(a) would appear not to be fully consistent with 3(b) which points to the principles and standards of Title VII as one of the included

statutes. Current Title VII law prohibits discriminatory treatment based on sex identified sub-groups, such as married women as opposed to married men or women with children as opposed to men with children. However, if the intent of S.1165 is to prohibit discrimination based on marital status or parental status in general, that is regardless of the employee's sex, then Section 3(a) fails to accomplish its purpose.

Second, the language "to the greatest extent applicable" in 3(b) tends to immediately suggest that there are parts of the principles and standards of the listed statutes that may not apply to legislative employees. Finally, each equal opportunity statute cited in Section 3(b) provides protections for applicants and for employees. However, the language of Section 3(b) of S. 1165 suggests that applicants are not covered. If applicants are to be covered, then Section 3(b) needs to be redrafted.

Under Section 6, a charging party must seek counselling within 180 days, and the counselling period is 30 days. At present, other federal employees must seek counselling within 30 days. The longer the interval is between the alleged incident of discrimination and the first official contact, the more likely it is that memories will fade and that pertinent documents no longer will be available. Further, our experience is that the quicker one seeks and obtains counselling the more effective the counselling sessions are.

It is unclear as to whether mediation is to take place within the 30-day counselling period, or concurrently with the processing of the formal complaint. Section 9 seems to imply the latter, as it only provides for resolution by agreement after a formal complaint is processed. However, the procedure for mediation is described in Section 6 which deals with counselling and the counselling period precedes the filing of a formal complaint.

Section 7 states that the Office of Congressional Employees Relations [rather than Office of Congressional Fair Employment Practices: See Section 4] not later than 20 days after holding a hearing must issue a decision. However, there is no stated time frame for that office to issue a decision where the complainant has not filed a request for a hearing. You may wish to address this omission.

S.1165 anticipates that congressional employees will have their complaints processed much quicker than those federal employees who utilize the existing federal processing scheme. However, based on our experience in the oversight of federal sector complaint processing, we believe the anticipated time frames to be overly optimistic. For example, according to S.1165, the hearing must be conducted not later than 10 days after the request, unless the Office of Congressional Employees Relations delays it, and then the delay can be no longer than 30 days. It is extremely difficult to

have several witnesses attend a hearing on short notice. The parties almost always request additional time to prepare for a formal hearing. On short notice, there are invariably scheduling difficulties for the examiner, the complainant, the charged office, and the respective witnesses for both sides. Difficulties are compounded if witnesses live outside Washington, D.C. We believe, in this case, the exception of 30 days will in fact be the rule. Additionally S.1165 states that a written decision must be issued not later than 20 days after the hearing. Again, our experience with reviewing documents submitted at a hearing and the possible lag time between the hearing and receipt of the official transcript suggest while this time frame is laudable it will be extremely difficult to meet.

Section 10(a) and 10(b) appear to establish two tiers of remedies when violations are determined. Section 10(a) states that monetary compensation can be provided to a victim of discrimination. Section 10(b)(1) of the bill provides for relief in addition to monetary compensation, where the violation is "serious." For a "serious violation" relief may include an injunction, costs and attorney fees, and employment, reinstatement or promotion (with or without back pay). Our first concern is that the term "serious violation" is not defined. We note that none of the anti-discrimination statutes that Congress seeks to apply to its employees, make distinctions between serious and non serious violations.

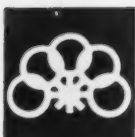
Under the civil rights statutes EEOC enforces, remedy is consistently defined as equitable "make whole relief." That means that where there is a finding that an employee or applicant has been unlawfully discriminated against, the victim is entitled to everything they would have received but for the unlawful discrimination. With this in mind, we question what "monetary compensation" means under Section 10(a). Complainants are entitled to monetary relief in the form of back pay or front pay or equitable relief as the courts may deem appropriate. However, complainants are not entitled to monetary compensation for damages such as mental suffering or emotional distress. If S.1165 contemplates monetary relief for these forms of hurt, this would be much broader relief than that contained in the laws Congress is extending to itself.

We also note that under S.1165, any award of monetary relief to an identified victim of discrimination is discretionary. The appropriate house of Congress must approve such a payment, regardless of whether the award is considered equitable relief or money for damages. It should be noted that judicial decisions interpreting federal EEO laws hold that victims will be made "whole" for the monetary or other losses he or she has suffered because of discrimination. For example, when a complainant can show that he or she suffered a loss in wages because of a discriminatory discharge, the courts summarily award back pay in

the amount of the loss, except in extraordinary circumstances. Federal regulations at 29 CFR 1613 provide the same kind of relief, monetary or otherwise, embodied in judicial precedent as well as the authority for agency heads or their designees to grant such remedy. Perhaps, vesting full authority in the Office of Congressional Employees Relations or the "review panel" may strengthen the process since discretionary remedy by majority vote would be removed.

A basic premise underlying the current federal process is that the agency in which the complaint arose has "first crack" at resolving the situation. However, if that effort fails, then there is an avenue for the complainant to obtain redress outside of his or her chain of command, with final adjudication by the courts. We believe this to be central to any system designed to evoke fair treatment in the workplace and employee belief therein. The process described in S.1165 does not contain any "outside" avenue for cases to be heard.

We appreciate the opportunity to comment on S.272 and S.1165 and applaud the Senate's effort to extend equal opportunity protections to its employees.


NWPC

NATIONAL WOMEN'S POLITICAL CAUCUS

1275 K Street, N.W., Suite 750, Washington, D.C. 20005 (202) 898-1100, FAX: (202) 898-0458

PRESIDENT

Sharon Rodine

VICE PRESIDENTS

Jacqui Young

Bernice Mitchell

Judith Minshberg

Judy Meacham

Judith Tarnes

TREASURER

Sarah Lichtenstein

RECORDER

Julie Newcomb

ADVISORY BOARD

Irene Navarro, Chair

Bella Abzug

Ella Alexander

Oswald Anderson

Luke Anguiano

Edward Arner

Ramona Bailey

Polly Baca Barragan

Liz Bell

Martine Benton

Polly Bergen

Rita More Brown

Charlotte Bunch

Yvonne Bromfield Burns

Ellen Burtin

Liz Carpenter

Sey Chasser

Shirley Chism

Rozanne Barton Conlin

Midge Corrao

Mary Dent Crisp

Ramona G. Curtis

Charles Curry

Marion Wright Edelman

Coy Eiland

Myrtle Even

Ramona F. Forenthal

Ramona Felt

Barbara Feldon

Melissent Fenwick

Sharon Flynn

Mary Greenwood Furst

Tracy D. Gary

Bill Gosh

Elizabeth Griffin

Blair Guggenheimer

Linda Hollenberg

Christie Hynes

Dorothy Hight

Elizabeth Hoffman

Konnie Horod

Mildred Jeffrey

Coretta Scott King

Odean Komer

Frances Lear

Norman Lear

Kate Rand Lloyd

Sally Lunt

Leon Lynch

Dore Messner

Joyce Miller

Midge Miller

Ms. Milgrom

Kathleen Nolan

Beatrix Holmes Norton

Jean O'Leary

Esther Peterson

Jane Peterson

Pat Richter

Betty Rumberg Polley

Lola Redford

Sharon Percy Rockefeller

Audrey Rowe

Carole Rozelle

Al Ruckelshaus

Claudine Schneider

Patricia Schroeder

Felice Schwartz

Donna Shalala

Sandra F. Shriver

Cathryn Simmons

Mary Louise Smith

Mary Stanley

Glenn Steinem

Maria Thomas

Joan Tobin

Moreno Tice

C. Delores Tucker

Lucia Valerio

Carmen Delgado Walker

Julia Montgomery Walsh

Marianne Wilentz

Kathy Wilson

William Winsinger

"CONGRESSIONAL FAIR EMPLOYMENT PRACTICES ACT" (S.1165)

Testimony by Sharon Rodine, President
National Women's Political Caucus
September 14, 1989

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, MY NAME IS SHARON

RODINE. I AM THE PRESIDENT OF THE NATIONAL WOMEN'S POLITICAL CAUCUS. WE ARE PLEASED TO SPEAK IN SUPPORT OF THE "CONGRESSIONAL FAIR EMPLOYMENT PRACTICES ACT" (S.1165), THAT WOULD MAKE A VARIETY OF IMPORTANT ANTI-DISCRIMINATION LAWS GOVERNING THE EXECUTIVE BRANCH AND PRIVATE SECTOR APPLICABLE TO THE U.S. SENATE AND HOUSE OF REPRESENTATIVES. THIS LEGISLATION IS LONG OVERDUE, AND WE APPLAUD YOUR EFFORTS, SENATOR GLENN, FOR EMPHASIZING THE IMPORTANCE OF THIS ISSUE.

I AM HERE TODAY NOT ONLY REPRESENTING THE WOMEN'S COMMUNITY, BUT REPRESENTING OVER 200 MEMBERS OF THE CAPITOL HILL WOMEN'S POLITICAL CAUCUS. THESE ARE WOMEN WHO ANSWER THE PHONES IN YOUR OFFICES, ATTEND HEARINGS, PLAN MARK-UPS, DO THE RESEARCH, PREPARE ISSUES BRIEFS, DEAL WITH CONSTITUENTS' CONCERNS, AND HANDLE THE LIST OF OTHER TASKS SO CRUCIAL TO CARRYING OUT THE WORK OF THE SENATE AND HOUSE. ALL OF YOU KNOW HOW MUCH YOU RELY ON THE WOMEN ON YOUR STAFF TO ACCOMPLISH YOUR WORK AND SERVE YOUR CONSTITUENTS AND THE AMERICAN PUBLIC.

THE CAUCUS IS TESTIFYING TODAY ON BEHALF OF THOSE WOMEN WHO SHOULD BE ABLE TO USE THEIR CAPITOL HILL EXPERIENCE TO

(TESTIMONY BY NWPC PRESIDENT, SHARON RODINE - PAGE 2)

ADVANCE THEIR CAREERS. . . NOT LOCK THEM AT THE BOTTOM OF THE PAY SCALE IN DEADEND POSITIONS.

IS THERE A PROBLEM? YOU BET. REPRESENTATIVE LYNN MARTIN SURVEYED PAY LEVELS FOR HOUSE STAFF EMPLOYEES IN BOTH 1985 AND 1988 -- AND THE NEWS ISN'T GOOD. THE 1988 SURVEY SHOWED THAT SEVENTY-NINE (79) PERCENT OF THOSE EARNING \$20,000 OR LESS PER YEAR WERE WOMEN, WHILE OVER TWO-THIRDS (2/3) OF THOSE EARNING \$40,000 OR MORE WERE MEN. THE FIGURES VARIED BY ONLY ONE OR TWO PERCENTAGE POINTS FROM THE 1985 SURVEY DATA.

THOUGH NO FULL SURVEY HAS BEEN CONDUCTED FOR THE SENATE, THERE IS LITTLE REASON TO BELIEVE THAT THE FIGURES WOULD BE ANY BETTER. FROM YOUR OWN RESEARCH, SENATOR GLENN, YOU HAVE INDICATED THAT FEWER THAN TWENTY-FIVE (25) PERCENT OF THE TOP JOBS IN THE SENATE ARE HELD BY WOMEN. BLACK STAFF MEMBERS ACCOUNT FOR LESS THAN FIVE (5) PERCENT OF THE TOP POLICY-MAKING JOB FOR THE SENATE.

THE FACTS ARE CLEAR. WOMEN ARE CLUSTERED AT THE BOTTOM OF THE PAY SCALE ON CAPITOL HILL. TOP LEVEL STAFF POSITIONS ARE PREDOMINANTLY HELD BY MALES. . . AND PREDOMINANTLY WHITE MALES.

(TESTIMONY BY NWPC PRESIDENT, SHARON RODINE - PAGE 3)

THE HOUSE SOUGHT TO RECTIFY ITS STAFFING INEQUITIES THIS SESSION BY PASSING THE FAIR EMPLOYMENT PRACTICES RESOLUTION (H.RES. 558) BY A RESOUNDING VOTE OF 408 TO 12. NOW THE SENATE HAS A CHANCE TO DO THE SAME AND SHOW ITS COMMITMENT TO IMPROVING EMPLOYEE'S RIGHTS.

THIS LEGISLATION COULD PROVIDE A REAL INCENTIVE FOR CHANGE. WE WANT TO SEE THIS BILL WORK. WE KNOW YOUR COMMITMENT TO THIS ISSUE, SENATOR GLENN, IS VERY STRONG. WE WANT THIS BILL TO HAVE A REAL-LIFE IMPACT. . . NOT JUST PASS IN PRINCIPLE AND NOT ACHIEVE THE RESULTS YOU ENVISIONED.

AS WRITTEN, S.1165 WOULD REQUIRE THE FULL HOUSE OR SENATE TO VOTE ON REMEDIES, INCLUDING NOT ONLY THE FINANCIAL COMPENSATION BUT ALSO INJUNCTIVE RELIEF. IN REALITY, THIS WOULD SERIOUSLY REDUCE THE INTEREST OF STAFF MEMBERS WHO WANT JUSTICE BUT DON'T WANT THE PUBLIC NOTORIETY WHICH WOULD MAKE IT DIFFICULT FOR THEM TO SECURE ANOTHER JOB. THE CAUCUS WOULD SUGGEST THAT THE REVIEW PANEL BE PERMITTED TO INSTITUTE REMEDIES WITHOUT FLOOR VOTES, OR AT THE VERY LEAST, TO INSTITUTE INJUNCTIVE REMEDIES WITHOUT FLOOR VOTE. THIS WOULD FOLLOW THE PATTERN OF THE CURRENT FAIR PRACTICES RESOLUTION IN THE HOUSE. AFTER ALL, THIS IS NOT AN IMPEACHMENT.

(TESTIMONY FROM NWPC PRESIDENT, SHARON RODINE - PAGE 4)

SECONDLY, WE SUGGEST THAT THIS BILL SHOULD APPLY NOT ONLY TO THE SIX MAJOR OF CIVIL RIGHTS AND FAIR LABOR BILLS INDICATED, BUT TO ANY FUTURE CIVIL RIGHTS BILLS INTRODUCED IN CONGRESS. AS YOUR INTRODUCTION OF THIS LANDMARK LEGISLATION CLEARLY DEMONSTRATES, YOU UNDERSTAND THE NEED TO ENSURE CIVIL RIGHTS PROTECTION FOR CONGRESSIONAL EMPLOYEES IN ALL AREAS IN WHICH THIS PROTECTION IS ENJOYED BY THE GENERAL PUBLIC. AS PROTECTION FOR THE GENERAL PUBLIC EXPANDS, SO SHOULD GUARANTEES AGAINST DISCRIMINATION FOR CONGRESSIONAL EMPLOYEES. WE URGE ALL SPONSORS OF FUTURE CIVIL RIGHTS AND LABOR LEGISLATION TO MAKE IT STANDARD PRACTICE TO AMEND THE LEGISLATION UNDER CONSIDERATION TODAY TO INCLUDE THE FUTURE PROTECTIONS. THE LEGISLATION YOU HAVE INTRODUCED, SENATOR GLENN, IS LIVING LEGISLATION AND SHOULD GROW AS NEEDED TO GRANT ALL RIGHTS TO CONGRESSIONAL EMPLOYEES THAT ARE ENJOYED OUTSIDE THESE HALLS.

THE "CONGRESSIONAL FAIR EMPLOYMENT PRACTICES ACT" IS JUST THAT -- FAIR. THE LAWS THAT CONGRESS ESTABLISHES FOR THE AMERICAN PEOPLE SHOULD BE GOOD ENOUGH FOR CONGRESS ITSELF. DOUBLE STANDARDS ARE NO LONGER ACCEPTABLE IN THE AREAS OF EMPLOYMENT OR IN THE AREAS OF LEGAL PROTECTION.

THE AMERICAN PEOPLE, AS YOU WELL KNOW, ARE INCREASINGLY CONCERNED ABOUT ISSUES OF ETHICS IN GOVERNMENT. THIS BILL

(TESTIMONY BY NWPC PRESIDENT SHARON RODINE, PAGE 5)

WOULD SEND A STRONG, POSITIVE SIGNAL TO THE AMERICAN PEOPLE,
THAT WHEN IT COMES TO THE EMPLOYMENT OF THEIR OWN STAFF MEMBERS,
CONGRESS WILL DO WHAT'S FAIR -- WHAT'S JUST -- AND WHAT'S
ETHICALLY CORRECT.

CAPITOL HILL STAFF MEMBERS HAVE A LOT TO GAIN WITH THE
PASSAGE OF THIS BILL. CONGRESS HAS A LOT TO GAIN. THE AMERICAN
PEOPLE HAVE A LOT TO GAIN. IT'S A WIN-WIN SITUATION FOR
EVERYONE.

UNITED STATES SENATE BLACK LEGISLATIVE STAFF CAUCUS

September 14, 1989

TESTIMONY OF

MS. JACKIE PARKER

before the

Senate Committee on Governmental Affairs

My name is Jackie Parker. Since 1979, I have served as Legislative Assistant to Senator Carl Levin of Michigan. Prior to that time, I served as Chief Legislative Assistant in the U.S. House of Representatives to the late Congressman James A. Burke of Massachusetts. I am the current Chair of the Senate Black Legislative Staff Caucus. Much of this statement today represents my personal view as a long-time congressional employee and advocate for increased employment on Capitol Hill. My remarks are not intended to exclusively represent the views of the members of the staff caucus.

Thank you Mr. Chairman for giving me an opportunity to share some concerns relative to the underrepresentation of African Americans in the Congress, particularly in the Senate. On behalf of the black staffers in the Senate, I want you to know we appreciate your vision, your commitment, and your diligence in moving this issue. We admire your ability and that of your colleague, Senator Patrick Leahy of Vermont, to persist in the face of strong opposition and

deafening indifference over the past 12 years. You have kept your eyes on what is required by simple justice. I would also like to acknowledge the active support of Senate Majority Leader George Mitchell, who has taken the time to meet with us to hear our concerns and has committed to improving the status of blacks in the Senate.

My participation here today is not only an honor for our organization, it is historic. With no black members in the Senate our caucus serves in this legislative body as a voice of black America on matters of national importance. We are not here as a result of any popular votes. We are a policy voice of black America by default. Ours is an awesome task.

Despite the fact that blacks represent more than 12 percent of the population, we have seen only one of our own elected to this prestigious body since the end of Reconstruction. We can find no pride in that historical note.

For many years, we have struggled with our role in the Senate. We have walked a delicate balance. On the one hand, serving as political and policy advisors in a capacity identical to that of our non-black staff colleagues. But on the other hand, having the responsibility to ensure that the Senators we serve are acutely aware of the impact of their decisions on the black community -- even in instances where

those members are not significantly influenced by a black voting population.

An increased presence of African-Americans in policy-level positions is critical. The unique life experiences that we bring to Congress is what sets us apart from our non-black colleagues, whose views predominately reflect those of upper-middle-class white males.

Unfortunately, our ranks are small. Despite the fact that African American voters have demonstrated their ability to significantly affect the make-up of the Congress, African Americans account for only 64 of the the approximately 2,7000 senior policy employees in the Senate.

There are no black administrative assistants and only one committee staff director out of a total of 26; one deputy committee staff director, three subcommittee heads out of 95, and one legislative director out of 100. There is only one press secretary, and one deputy press secretary on the personal staffs of the 100 members of the Senate, and none on the 121 Senate full committees and subcommittees. It is sad that this is the highest number of black policy advisors in the history of the U.S. Senate.

Although nine percent of the policy positions in the U.S. House of Representatives are held by blacks, that figure drops to only three percent once the staffs of the 24 black members are excluded. In a June 12, 1987, letter to

his colleagues in the House, urging that they hire more blacks, Congressman Mervyn M. Dymally, then chairman of the Congressional Black Caucus, wrote, in part:

"There are only 12,290 employees of the House of Representatives, yet fewer than three percent of the black staffers are hired by non-minority members...while the pool of qualified blacks is significant, the record of hiring is disappointing. We have much to do in both houses to bring aboard competent staff with a wide range of expertise in positions of significant and substantive responsibility."

For the most part, the existing atmosphere does not encourage or promote the hiring of blacks; nor does it nurture or promote black professionals as it does white professionals. Although more blacks have been employed in recent years, the proportion of blacks to whites has changed little even while staffs have mushroomed. The fact that this percentage has remained stagnant during the last 20 years becomes particularly glaring when one considers that the pool of qualified black applicants has expanded. Of the 400 resumes currently placed with our staff caucus, 53 percent have law degrees, 30 percent have graduate degrees, and 10 percent have previous hill experience.

The current system of hiring depends largely on an informal network of contacts. Those who are in the communications loop have an opportunity to vie for vacant positions; those who are not a part of that network rarely know an opening exists. Such informal networks can have the same devastating effects as an explicitly discriminatory system, since blacks are disproportionately out of the loop. It is especially troubling that many of those in Congress who have been unwavering proponents of civil rights legislation choose staff members through this informal network.

Members of both houses of Congress must make a moral decision and a firm commitment to hire more blacks. Congress must go above and beyond the spirit of the anti-discrimination laws it has enacted for the rest of the country -- and from which it has exempted itself. There is currently a closed-door process. This must change.

Finally, Mr. Chairman, the situation is most ominous for our brothers and sisters who provide the vital support and maintenance service in the U.S. Senate. Promotions are rare and skilled jobs are almost, always held by whites. What is most shocking is the fact that there are no African American painters, carpenters or plumbers. Mr. Chairman, this is unconscionable.

In closing, I would like to include for the hearing record remarks which I made at a 1987 event in the Senate relative to the contributions African American staffers are making to the U.S. Senate, and to our organization. The remarks were given in conjunction with an award ceremony and tribute to your colleague from Ohio, Representative Louis Stokes. You were kind enough to place those remarks in the Congressional Record. The remarks are as follows:



Congressional Record

PROCEEDINGS AND DEBATES OF THE 100th CONGRESS, FIRST SESSION

Vol. 133

WASHINGTON, MONDAY, DECEMBER 21, 1987

No. 205—Part II

LEADERSHIP AWARD FOR CONGRESSMAN STOKES

Black Legislative Staff Caucus of the U.S.
Senate, September 29, 1987.

Mr. GLENN. Mr. President, I would like to bring to your attention a moving event that occurred on September 25 of this year during the presentation of the Leadership and Achievement Award to my Ohio colleague and friend, Congressman LOUIS STOKES.

The event, sponsored by the Senate Black Legislative Staff Caucus (SBLSC), focused on the achievements attributed to Lou for his outstanding work as a member of the Select Committee on Investigative Covert Arms Transactions with Iran, and its investigation of the controversial Iran-Contra affair. The SBLSC, an organization of black policy advisers in the Senate, presents this award annually to a Member of the Congressional Black Caucus in conjunction with the CBC's annual Legislative Weekend. For his cool-headed handling of these historic proceedings in a highly visible, media-covered setting, Lou was indeed an excellent choice for this year's award.

I was particularly moved by the introduction of Congressman STOKES by Senate staffer Jackie Parker, who serves as president of the SBLSC, and as legislative assistant to Senator CARL LEVIN. I wanted to share with my colleagues the warmth and sincerity reflected in those remarks concerning my most deserving and capable colleague, which we all share, along with my personal congratulations to Lou.

This is the time of year that the SBLSC also pays tribute to its members. This tribute, which is included in Jackie Parker's statement, is an impressive summary of contributions that black professionals are making to our work here in the Senate.

I am sure that my colleagues would be interested in reading this insightful statement and tribute, and I ask unanimous consent that it be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

LEADERSHIP AND ACHIEVEMENT AWARD TO CONGRESSMAN LOUIS STOKES

(Remarks by Jackie Parker, President,
Senate Black Legislative Staff Caucus)

On behalf of the Members of the Senate Black Legislative Staff Caucus, I welcome you to our third annual reception in honor of the Seventeenth Annual Congressional Black Caucus Legislative Weekend.

Today, we present our 1987 Leadership and Achievement Award to Congressman Louis Stokes, Representative from the 21st District of Ohio, in recognition of his outstanding participation as a member of the Select Committee to Investigate Covert Arms Transactions with Iran.

Whenever a crisis in government occurs in our country, whether it be due to scandal or subversion of democratic processes, we seek problem-solvers whose integrity and character are unquestioned.

Over the past 15 years, Speakers of the U.S. House of Representatives have continually looked to Congressman Stokes when leaders of high moral character are needed to restore the trust and confidence of the American people.

When deeply felt doubt continued to mount over the assassination of President Kennedy and Dr. Martin Luther King, Jr., Speaker of the House Carl Albert chose Congressman Stokes to serve on the House Select Committee to Conduct an Investigation and Study of the Circumstances Surrounding the death of President John F. Kennedy and the death of Dr. Martin Luther King, Jr.

When the importance of that committee was fully recognized and made in to the Permanent House Select Committee on Intelligence, Congressman Stokes was appointed Chairman, a position which he currently holds.

In November 1983, Speaker of the House Thomas P. O'Neill appointed Congressman Stokes to serve as a member of the Congressional Delegation to Grenada.

And most recently, when Oliver North and company decided that American Foreign Policy was better conceived through the likes of a grade-B spy thriller than the will and democratic processes of the American people, Speaker of the House Jim Wright chose Congressman Stokes to serve on the House Select Committee to Investigate Covert Arms Transactions with Iran.

I posit with confidence that no other Member of Congress in the history of the United States has ever been chosen by three successive Speakers of the House on three different occasions to set the record straight on issues of such profound national concern.

Both the Print and Broadcast media, including the Washington Post, the Congressional Quarterly, and the Cleveland Plain Dealer have lauded Congressman Stokes for his tenacious and searching inquiries of the witnesses, his firm command of details, and

his candor in questioning the credibility of Admiral Poindexter's testimony.

The American public, however, may have been most moved by Congressman Stokes' message to Oliver North on the meaning of patriotism. On that day Congressman Stokes spoke of a patriotism rooted not in a tale of illegal acts against foreign countries, but of patriotism rooted instead in a story of love and commitment which allowed a poor black family to struggle successfully for their share of the American dream. It was a story of commitment to service in a segregated Army and of a widow left with two children under three years of age traveling great distance to, in her own words, "do day work for the wealthy ladies of the suburbs" so that her children could "get all the education they could—and be somebody."

Congressman Stokes said, and I quote:

"In fact, Colonel North, as I sit here this morning looking at you in your uniform, I cannot help but remember that I wore the uniform of this country in World War II in a segregated Army. I wore it as proudly as you do even though our government required black and white soldiers to live, sleep, eat and travel separately and apart while fighting, and, in some cases dying, for our country. Similar to Senator Mitchell's humble beginning, my mother—a widow—raised two boys. She has an eighth grade education and was a domestic worker. One son became the first black Mayor of a major American City—Cleveland, Ohio, the other sits here today as Chairman of the Intelligence Committee of the House of Representatives. Only in America, Col. North only in America. And while I admire your love for America, I just hope you will never forget that others, too, love America just as much as you do and that others, too, are willing to die for America just as quickly as you are."

Congressman Stokes' story is not one of his own success rather, a story of his aspirations for others. It is a tale of his aspirations to tear down the racial and economic barriers that make an achievement such as his so momentous. It is a tale of his aspirations to at last, transform the illustrious dream of Dr. Martin Luther King into an every day reality for people of color everywhere. These are the aspirations that have led many of us to this room today—a belief that our concerted struggle can make a difference.

I have had the pleasure of knowing and working with Congressman Stokes since the early 1970s. During these years he has demonstrated the ability to take on important tasks for the nation, but he has never taken on an air of self-importance. He has always been able to put himself in perspective and maintain his sense of humor.

Take for example an incident during the Kennedy investigation which was relayed to me by my colleague Chuck Cutolo, a former House staffer. Congressman Stokes was, of course, aware of the controversy that surrounded the Warren Commission Report for many years. He knew of the questions that still ate at the American public about the tragedy and the investigation which followed. But, now there was a lot of talk about the slow movement of the Committee's investigation.

While he was in an elevator with one of his colleagues one day, he was asked how

the Committee's work was coming along. Congressman Stokes paused and then said in a thoughtful tone. "Well, at this point we've ruled out suicide."

Today, we honor Congressman Stokes for his work on the Iran-Contra panel. But this is by no means the only accomplishment for which he deserves praise. As a ranking member of the House Appropriations Subcommittee on Health, Congressman Stokes has championed the cause of insuring adequate funding for needed health care programs which benefit all Americans.

At first glance, these achievements appear unrelated. However, I see a direct correlation between the health of the people and the health of the body politic. Congressman Stokes has managed to bridge these two fundamental concerns. In each case, Congressman Stokes has tried to diagnose an illness and cure us of a disease. In one case, he has worked to call attention to society's neglect of the poor and the sick, and in the other, to the government's neglect of the law. In each case, he has been driven, as he continues to be, by a compassionate concern for the impact of federal policy on people as individuals, and a passionate desire to see that all individuals are treated fair and equal under the law.

We are proud of you Congressman. We love you.

We take great pleasure in presenting this award to you. It reads as follows:

"To the Honorable Loula Stokes for outstanding service to the Nation during the 1987 Iran-Contra hearings and for continuing dedication to the aspirations of Black Americans."

Black Legislative Staff Caucus of the U.S. Senate, September 25, 1987."

And now Congressman, as promised, I would like to introduce the illustrious members of the organization of black policy advisers for whom I have the honor of serving as president. But first I would like to thank Art Hill and Bradford Gary for their assistance and support of this event. Also, let me say that we are deeply honored that Senator John Glenn and his wife Annie have joined us in paying tribute to you today, Congressman. Thank you Senator Glenn for your earlier remarks about your colleague from Ohio, and thank you for your kind words about our group. We are also honored to have with us Dr. Norman Francis, President of Xavier University in my home town of New Orleans and father of SBLSC Parliamentarian Tim Francis, and my dear friend Jim Cole, President of the National Bar Association.

I can think of no better place to begin the introductions than with an earlier SBLSC President, Mary Stansel, who contributed substantially to the building of the solid foundation from which this organization evolves. Mary remains available to us as a veritable storehouse of information and wisdom and has added to this organization's reputation for resourcefulness and quality when she organized and chaired our 29th Africa forum on Angola, upon her return from that country earlier this year.

I am immensely proud to be able to make the next introductions. An historic first in the United States Senate, seven black staffers provide counsel and advice that are crucial to policy emanating from the Judiciary Committee—a committee which has jurisdic-



tion over such matters as Federal Courts and Judges; Apportionment of Representatives; Constitutional Amendments; National Penitentiaries; Immigration and Naturalization; Bankruptcy, Munition and Espionage; Civil Liberties; and Protection of Trade and Commerce against Unlawful Restraints and Monopolies. No list of credits would be complete, let alone timely, if we did not pay a very special tribute to these staffers for their work on the nomination of Judge Robert Bork to the United States Supreme Court. With the exception of two staffers, Special Counsel Reginald Govan who handled nominations prior to Judge Bork, and who, to our great dismay, will shortly leave the Judiciary Committee and Sebraien Haygood, Investigator for the Judiciary Subcommittee on Antitrust, Monopolies and Business Rights—they are:

Ron Legrand, Chief Investigator and Counsel, Judiciary Committee (Senator Biden);

Jeff Robinson, Minority Chief Counsel and Staff Director, Judiciary Subcommittee on the Constitution (Senator Specter);

Linda Greene, Counsel, Judiciary Subcommittee on Antitrust, Monopolies and Business Rights (Senator Metzenbaum);

Bill Lewis, Counsel, Judiciary Committee (Senator Biden); and

Margaret Morton, Counsel, Judiciary Subcommittee on the Constitution (Senator Specter).

And as I speak about the tremendous contributions of these Judiciary Committee staffers, I am reminded of just how fortunate I am in the excellent Board I have to work with. Given their outstanding credentials, impressive backgrounds, and brilliant minds, and being able to move with their support in the day-to-day life of this organization truly means something. Their wise counsel on crucial matters has contributed in no small part to the success of our numerous undertakings. I am therefore particularly proud to introduce the distinguished members of the Executive Board of the Senate Black Legislative Staff Caucus:

Ralph Everett (Highest ranking black staffer in the Senate), Chief Counsel and Staff Director, Committee on Commerce, Science, and Transportation, Senator Hollings;

Faye Drummond, SBLSC Vice President and Health Policy Advisor to Senator Moynihan;

Bob Harris, SBLSC Treasurer and Staff Director, Governmental Affairs Subcommittee on Federal Spending, Budget and Accounting, Senator Chiles;

Erline Patrick, (SBLSC Secretary) Professional Staff, Small Business Committee, Senator Weicker;

Portia Mittelman, (SBLSC Assistant Secretary) Legislative Assistant, Office of Senator Pryor;

Tim Francis, (SBLSC Parliamentarian) Legislative Assistant, Office of Senator Breaux;

Mike Frazier, (SBLSC Legislative Committee) Legislative Assistant, Office of Senator Kennedy; and

Evelyn Boyd, (SBLSC Speaking Committee) Legislative Assistant, Office of Senator Sasser.

I would like to mention just a couple of the many significant contributions Faye Drummond, our vice Chair, has made to the group. As organizer of our first major

health forum on the status of Black Health in America several years ago, she has provided crucial follow-up by maintaining a network of black health professionals readily available to present testimony before the Finance Committee. She has also devoted her considerable background in the health area to the South Africa scene, including a fact-finding visit to Southern Africa and subsequent presentation of her findings.

Major contributors to the success of our historic health forum were Eartha Isaac, Legislative Assistant to Senator Specter, and Lionel Collins, formerly with Senator Long and who currently provides counsel to the Banking Subcommittee on Housing. I would be remiss if I did not mention that without Lionel's well-placed assistance on the Senate Floor during consideration of the Emergency Homeless Relief bill, an important mobile health van amendment would not have had the smooth sailing it did.

We all look forward to future SBLSC health initiatives, especially in view of the fact that we now have a "Doctor in the House." Stephen Keith, M.D., Health Counsel to the Labor and Human Resources Committee is a most welcomed addition to our group. Keith's recent drug briefing enhanced the ability of health staffers to better advise their Senators on this present menace to American society.

Eartha, along with Lenora Odeku, Legislative Assistant to Senator Simon, and Mike Frazier, also provides counsel in the formulation of Africa policy. Lenora revealed her considerable knowledge in this area this year when she chaired several of our discussions on internal developments in Southern Africa.

In addition to Ron Legrand and myself, several other members of our group previously served as staffers in the House. As Congressional Black Caucus Foundation Program Director from 1979-1981, I know that Sheryl Webber Washington is very special to the members of CBC. She is also very special to us and to the Commerce Subcommittee on Surface Transportation where she serves as a member of the Professional Staff. It is certainly one big highlight in my Capitol Hill career to have had the opportunity to accommodate Sheryl in a very small way during the infant stages of the CBCF Intern-Fellows program in 1979. Sheryl brings to the Senate the same diligence, creativity and vitality she exhibited in the House.

Jackie Knox served on the House staff of then-Congressman Thad Cochran and stayed on board when he won election to the U.S. Senate in 1978. She is Minority Staff Director for the Labor Subcommittee on Aging, which the Senator chairs. We are all proud of Jackie's skillful staff work in helping to formulate legislation in the Older Americans Act specifically targeting minorities.

The theme of CBCF's Seventeenth Annual Legislative Weekend is "Educating the Black Child: Our Past and Our Future." I know that Congressman Stokes joins us in recognizing the hard work in this area by our colleague Bud Blakey, former House staffer with then-congressman Paul Simon and present Staff Director and Chief Counsel of the Senate Labor Subcommittee on Employment and Productivity. In 1973 I had the privilege of convening the first Con-

gressional Conference on the Survival of Black Higher Educational Institutions. I take great pleasure in noting Bud's direct involvement over the years in translating many of our findings and recommendations, our hopes and our dreams in the critical area of education into a reality. We can never thank Bud enough for all he has and continues to mean to our cause in higher education.

There are many other able and committed staffers who labor daily for the cause of educational equality. They are staffers like my wise and spirited friend from Alabama, Mansel Long, Legislative Assistant to Senator Heflin, and diligent workers like Sylvia Davis Thompson, Legislative Assistant to Senator Dixon, Margaret Owens, Legislative Assistant to Senator Biden, Quinn Middleton, Legislative Assistant to Senator Gore, and Kathy Wellman, Legislative Assistant to Senator Sanford.

Next I would like to recognize someone who daily participates in the high level discussions surrounding national budget issues: James Carr, Senior Analyst on the Budget Committee, and probably the hardest working staffer in the Senate. I don't know how he does it; despite his grueling schedule, he has three books to his credit, and I understand he is about to finish a fourth.

With other able and hardworking staffers like Carolyn Jordan, Counsel to the Committee on Banking, Housing and Urban Affairs and internationally recognized as an authority on monetary issues Budget Committee Analyst Kim Wallace and Frankie King, Nathaniel Thomas and William Harrison of the Joint Economic Committee, we have a voice in the Budget and Economy arena.

We are indeed fortunate to have a number of SBLSC members whose daily tasks are assisting in the formulation of policy, on the personal staff level, in such vital areas as Appropriations, Tax, Trade, Defense, Agriculture, Labor, Environment and Judiciary. They are:

Lynnette Shelton, Legislative Assistant to Senator Cochran; Lori Brown, Legislative Assistant to Senator Nunn; Mark Alexander, Legislative Assistant to Senator Metzger; Lynwood Evans, Legislative Fellow with Senator DeConcini; Steven Hilton, Legislative Assistant to Senator Specter; Charlotte Hayes, Legislative Assistant to Senator Mikulski; Carolyn Hunter, Legislative Assistant to Senator Bond; Kevin Monroe, Legislative Assistants to Senator Sanford; Phyllis Hallmon and Wendell Chambliss, Legislative Assistants to Senator Shelby; Linda Parson, Legislative Assistant to Senator Glenn and Tracey Thornton, Legislative Assistant to Senator Fowler. Other falling into this category are my dependable colleague and friend, Ben Cannon, Legislative

Assistant to Senator Johnston and Robert Mallett, Staff Counsel to Senator Bentsen who, along with Lionel addressed the Department of Health and Human Services Federal Policy Conference on behalf of SBLSC earlier this year.

In so many ways—more than words can relate—we owe so much to the following partners in our important undertakings. Each has displayed a continued commitment to working through and on the legislative process to achieve shared goals. It is be-

cause of their ongoing commitments to SBLSC as well, that we've been able to achieve so much in such a short time. They are:

Robert Wilson, Minority Chief Counsel, Small Business Committee for Senator Weicker and presenter of the SBLSC's 1986 award to Congressman Parren J. Mitchell; Toni Cook, Staff Counsel, to the Commerce Subcommittee on Communications and Chair of the SBLSC task force on membership and interns; Leonard Willis, Investigator, Governmental Affairs Subcommittee on Oversight; Nancy Smith, Legislative Assistant to Senator Kerry; Marjorie Sudderth, Legislative Assistant to Senator Weicker; Frank Turner, Legislative Assistant to Senator Mikulski; George Bentley, Counsel, Committee on Veterans' Affairs; Michael Bracey, Assistant Counsel and Investigator, Committee on Veterans Affairs; Joyce Rice, Legislative Assistant to Senator Sarbanes; Paul Drayton, Staff Counsel, Committee on Governmental Affairs for Senator Roth; Stephanie Johnson, Legislative Assistant to Senator Humphrey and Edwin Smith, Legislative Fellow with Senator Moynihan;

Let me take a moment to say thank you to a number of staffers I see who no longer work in the Senate, and to those that I see who will soon be leaving us. All have contributed so much to our cause. I take great pleasure in recognizing the following individuals:

Suzanne Mayo, formerly with Senator Johnston; Patricia Murdock and Harold Brazil, formerly with Senator Glenn; Keith Colona, Claudette Humphries and Barbara Savage, formerly with Senator Levin; Janice McKnight Magna, formerly with Senator Specter; Sheryl Cashin, formerly with Senator Fowler; Lonnie Taylor, formerly with Senator Specter; Maurice Watson, Senator Danforth; Lucy Connors, formerly with Senator DeConcini; Bob Bates, formerly with Senator Kennedy; Gordon Alexander and Mary Helen Thompson who were staffers with former Senators Birch Bayh and Paul Tsongas respectively; and Henry Akins, Immediate Past SBLSC President, formerly with Senator Bumpers.

I would also like to recognize two very distinguished staffers whose work in the House parallels that of SBLSC. They are Charline Day Hollifield, President, Congressional Black Associates and Senior Legislative Assistant to Congressman William Gray and Don Temple, Senior Staff Counsel to the House District Committee and President of the 21st Century and ACPS.

Last, but by no means least, having reasonable access to colleagues you can count on can make a big difference to success or failure around here. I owe more than words can say in this respect to the high degree of cooperation I always can count on from the following individuals from both Houses of Congress. They are:

Daisy Minter, Governmental Affairs Subcommittee on Federal Spending, Budget and Accounting; James Mitchell, Senator Breaux's Office; Cynthia Bodrick, Commerce Committee; Judy Jackson, Finance Committee; Donnalyn Smith, Senator Johnston's Office; Dwanda Glenn of Senator Levin's Office; Ernestine Hunter of Senator Glenn's Office; Dee Jessup of Senator Proxmire's Office; and Dora Jean Malachi of the Congressional Budget Office.

From the House, Amelia Parker, Executive Director of the Congressional Black Caucus; Mickey Harmon and Adwoa Dunn of the House Subcommittee on Africa; Gwen Brown, Legislative Director to Congressman Julian Dixon; George Dalley, Administrative Assistant to Congressman Charles Rangel; Steve Pruitt and Singleton McAllister of the House Budget Committee; Tammy Hawley and Joyce Freeland of Congressman Mfume's office and Johnny Barnes of Congressman Fauntroy's Office.

U.S. SENATOR PATRICK LEAHY

VERMONT

STATEMENT OF SENATOR PATRICK LEAHY

GOVERNMENTAL AFFAIRS COMMITTEE HEARING ON
CONGRESSIONAL EMPLOYMENT PRACTICES
SEPTEMBER 14, 1989

I am pleased that today the Governmental Affairs Committee considers proposals to reform congressional employment practices. And I thank you for the opportunity to testify in support of S. 272 and S. 1165.

One might say that we are here to discuss "the Golden Rule" because this debate boils down to Congress "doing unto ourselves as we do unto others."

Well, the premise is just that simple. It is time for Congress to put an end to the "last plantation."

Let me begin by commending Chairman Glenn for his persistent efforts in this area.

We have worked together for many years -- with dogged determination -- to remove the double standard which we in Congress apply to our own workers. I hope this is the year that our efforts pay off.

I would be tempted to say that this is reform whose time has come, if it were not already so painfully overdue. This Congress marks the sixth time I have introduced the Fair Employment in Congress Act.

Over the years this legislation has not been met with great enthusiasm. In fact, this reform seems to make some Members' hair stand on end. When I first introduced this proposal eleven years ago, the response was truly hostile.

I will never forget that day. After giving what I thought was a stirring speech on the Senate floor, and explaining exactly what this legislation would do, a senior Member came up to me and asked where I was going. I said I was rushing off to catch a plane to Vermont. He said, "Good, stay there."

In the name of civil, social, physical and economic working rights and standards for American workers, we pass landmark legislation like the Civil Rights Act of 1964, the Fair Labor Standards Act, the Occupational Safety and Health Act, and the Rehabilitation Act of 1973. Working rights and standards for most American workers, that is. Not so if you work for Congress.

By exempting itself from important civil rights and labor laws, Congress has denied to the men and women who serve us every day the rights and protections afforded to other American workers, simply because of the nature and place of their employment.

We as Members of Congress have traditionally considered our employment practices and office administration to be our own prerogative. Many comment that Senators and Congressmen require an unrestricted choice of staff because of the absolutely confidential relationship between a Member and his or her advisers. I understand their concern that placing an outside set of standards on that right of independent choice could limit the exercise of conscience that is the first duty of any Member.

I respect that argument. As a Senator I depend on a loyal staff.

But this issue does not have to be framed as a choice between preserving the relationship between a Member and his or her staff and establishing equity and fairness for our workers. We can bring Capitol Hill under the same standards which we believe the rest of the country should follow without compromising our special responsibilities as Members of Congress.

We all remember the news stories describing "Dickensian" working conditions of employees in the House folding room. This intolerable situation prompted commendable action by the House. I do not think that we in the Senate should wait for a similar incident on this side of the Hill before we act.

If enacted, the Fair Employment in Congress Act, S. 272, would apply to Congress the following laws:

- The Civil Rights Act of 1964 and the Equal Employment Opportunity Act,
- The Civil Service Reform Act,
- The Fair Labor Standards Act,
- The Equal Pay Act,
- The Age Discrimination in Employment Act,
- The Occupational Safety and Health Act, and
- The Rehabilitation Act of 1973.

Removing the congressional exemption from the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972, will make Congress subject to the same restrictions in employment discrimination that apply to the rest of the country.

Removing the congressional exemption to the Civil Service Reform Act will afford legislative branch employees the same rights as other Federal workers -- who can now organize, bargain with management, complain about unfair labor practices, and seek fair settlement of grievances.

Removing the congressional exemption to the Fair Labor Standards Act and the Equal Pay Act will give legal standing to the minorities and women who often do not receive equal pay for equal work.

Removing the congressional exemption to the Occupational Safety and Health Act says that Congressional workers are deserving of a safe and healthy work environment. OSHA is an example of the kind of law that should apply to all working Americans.

Removing the congressional exemption to the Age Discrimination in Employment Act speaks to a bias that has no place in a nation where young and old need each other in the workplace, where innovation and experience are both needed for productivity.

Removing the congressional exemption to the Rehabilitation Act of 1973 will only begin to bring Capitol Hill in line with the rest of the country, where we have come a long way toward ending discrimination against individuals solely on the basis of a physical handicap.

Just last week, the Senate passed the Americans with Disabilities Act. This historic legislation extends the simple justice of our civil rights laws to Americans with disabilities. I am pleased to note that Congress would be covered by the provisions of that bill. In debating the Americans with Disabilities Act on the Senate floor, however, some of our colleagues mentioned that bringing Congress under the provisions of that Act could violate the separation of powers. Enactment of the legislation could be jeopardized by the constitutional questions raised by Congressional coverage.

Mr. Chairman, we should consider including the Americans with Disabilities Act in both of our bills.

Congress ought not to enjoy a blanket exemption from the laws we have applied to others in this nation. That is the premise of the Fair Employment in Congress Act, S. 272, and of the Chairman's bill, S. 1165.

Some Members argue that the proposal raises potential constitutional concerns. I believe that those concerns can and must be addressed so that we can bring Congress under our civil rights and labor laws. For example, the in-house enforcement mechanism included in your bill, Mr. Chairman, takes a big step toward addressing the problem of oversight by the executive or judicial branches.

In closing, I want to mention one situation which has been brought to my attention. Earlier this year, several Senate office building window washers contacted me about possible discriminatory salary and promotion practices within the Architect of the Capitol's office. The laborers are concerned about pay disparities between minority and white employees, compensation for the risks associated with their jobs, and the difficulty minority workers seem to have in moving up the pay scale.

I would ask you to place in the record a letter from the Senate office building window washers. The issues these employees raise should be considered as we discuss employment practices here on Capitol Hill.

Again, I thank the Committee for the opportunity to testify today. Your holding a hearing on S. 272 is very encouraging to me.

Congress may at last be willing to shut down the "last plantation" and to discard our double standard.



STATEMENT OF SENATOR PAUL SIMON
BEFORE THE SENATE COMMITTEE
ON GOVERNMENTAL AFFAIRS

SEPTEMBER 14, 1989

Mr. Chairman, thank you for the opportunity to appear before this Committee to discuss an issue of great importance.

Today, the Committee is considering two legislative proposals to correct an inequity in our own backyard. For too long, we have exempted our own employees from the protections we have afforded to all others. We have prohibited other employers from discriminating against employees on the basis of race, color religion, sex, handicap, age or national origin. Yet, in the shadow of the Capitol dome, our own employees remain unprotected. We require other employers to provide safe workplaces, yet again we exempt ourselves from coverage. The list goes on and on. Congress consistently exempts itself from the rules it requires others to obey. This is hypocrisy pure and simple, and the time has come for it to end. Mr. Chairman, I commend you for holding this hearing and for your leadership in this area.

One approach before the Committee is S. 1165, the Congressional Fair Employment Practices Act. Sponsored by Senators Glenn and McCain, S. 1165 would establish an Office of Congressional

Employee Relations to apply to congressional employees the principals and standards of the protections afforded in the Civil Rights Act of 1964, the Fair Labor Standards Act of 1938, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, and the Occupational Safety and Health Act of 1970.

The other approach, sponsored by Senator Leahy, is S. 272, the Fair Employment in Congress Act. S. 272 would amend the laws cited above, and the labor-management relations provisions of the Civil Service Reform Act of 1978 to explicitly extend statutory protection to employees of "units of the legislative branch."

The primary distinction between the two approaches is clear. S. 272 provides for statutory protections through the existing laws and administrative processes, and S. 1165 provides for the establishment of a separate office with its own procedures. The statutory approach would appear to provide the strongest protections for our employees, yet many argue that there is a constitutional separation of powers problem with this method. Others are concerned about the potential for politically motivated enforcement of such laws. I understand these arguments, yet I also realize that given the nature of our positions as Members of Congress, we can never completely avoid the dangers of politically motivated charges of impropriety.

Indeed, I see strengths and weaknesses in both approaches before the Committee today. But most of all, I see a serious problem

that needs to be resolved. For this reason, I have cosponsored both measures, and I intend to do all I can to ensure that employees of the Congress receive the protections that they deserve.

I am heartened by the recent actions in the House of Representative in the last session of Congress. In the 100th Congress, the House passed the Fair Employment Practices Act. Similar to the approach outlined in S. 1165, the Federal Employment Practices Act provides certain basic civil rights and labor protections to employees of the House. This is a major step forward in the effort to remedy this serious problem, and it could not have been accomplished without the leadership and hard work of a number of my colleagues in the House, including Chairman Hawkins, Representative Schroeder, Representative Panetta, Representative Bartlett and a fellow Illinoian, Representative Lynn Martin.

Senator Glenn's Dear Colleague letter on this issue included a quotation that I believe hits the nail on the head. Discussing Congress's tendency to exempt itself from various laws, former Senator Sam Ervin once said:

"It seems to suggest that the Doctor is willing to provide for patients medicine which he himself would not take."

Well, Mr. Chairman, I think we as a society have learned that the medicine of civil rights protection is good medicine, the medicine of labor protection is good medicine, and the medicine of occupational safety and health protection is good medicine. Its time for Congress to swallow the pill, and when we do, I am sure we will all feel a lot better for it.

"CONGRESSIONAL FAIR EMPLOYMENT PRACTICES ACT" (S.1165)

TESTIMONY OF LINDA B. BERG, ATTORNEY AT LAW

OCTOBER 3, 1989

Mr. Chairman and members of the Committee:

I wish to thank this Committee for the opportunity to testify concerning this important legislation. During the past thirteen years, as an attorney in private practice, as well as general counsel for the National Organization for Women, I have been involved in issues concerning employment practices within the United States Senate. You have heard much testimony which describes Congress as the "Last Plantation." The purpose of my testimony is to briefly describe to the Committee the range of Senate employment practices with which I have been involved. This testimony also addresses the inherent difficulty in obtaining redress for victims of Senate employment practices which would be clearly illegal by any other employer. Because of the fact that the Senate has exempted itself from all laws governing employment practices, there are very few attorneys, beside myself, who have taken on representation of persons who complain of unfair employment practices within the Senate.

The only law of this land which I have found the Courts to hold the Senate responsible to is the United States Constitution. Without the passage of the "Congressional Fair Employment Practices Act", and with a more conservative judiciary in place, I fear that even that avenue will be closed to Senate employees.

In addition, it is important to point out that to pursue a constitutional claim in court is an undertaking most attorneys and clients are not willing to pursue.

The testimony which has been presented thus far has dealt with the theoretical need for this legislation and the symbolism inherent in the action of the Senate finally taking on the legal responsibilities to which it holds all other employers. The purpose of my testimony is to describe to the Committee the "real life" cases with which I have personally been involved and the legal challenges which they presented. Had S.1165 been in place at the time, a simple resolution all these cases might have been possible.

Case 1:

In 1976 a person was discharged from a Senate Office for what the supervisor characterized in the dismissal letter as "misconduct." A hearing within the Senate to contest the veracity of the misconduct charge was denied. When the dismissed employee filed for Unemployment Compensation, the compensation was denied because the allegation in the dismissal letter of "misconduct" was deemed to be a "Federal Finding of Fact." Although "Federal Findings of Fact" are binding on the Unemployment Compensation Board, there is nowhere else in government where a "Federal Finding of Fact" can exist without a hearing. It took two years of litigation, through two levels of the District of Columbia Court system before the D.C. Court of

Appeals agreed that denial of unemployment compensation without a right to a hearing on the facts constituted a violation of my client's Fifth Amendment right of Due Process. A hearing by the Unemployment Compensation Board was subsequently held. It was found that no misconduct by my client had occurred, therefore my client was awarded the long denied employment compensation.

Case 2:

In 1976, my client was fired from her position as a telephone operator for the Senate. She alleged that her dismissal resulted from her contesting a discriminatory and unclear maternity leave policy. It took five years of litigation before the United States Court of Appeals for the District of Columbia held that her allegations constituted a valid claim of violation of her First and Fifth Amendment rights. She was reinstated in her position after a settlement at the same time that the child with which she was pregnant at the time of her discharge entered kindergarten.

Case 3:

In the early 1980's, I was consulted by a Senate cafeteria worker who alleged racial harassment. At the time of the incidents of which she complained, she was the only white worker in the area to which she was assigned. She complained of continual verbal abuse from her co-workers and supervisor. Although anywhere else this situation would clearly be covered by

Title VII, the prospect of trying to pursue a constitutional claim of racial harassment and discrimination in court was daunting, and my client decided not to pursue her claim.

Case 4:

In the mid 1980's, a representative of a group of employees consulted me because they believed that their pay scale resulted from sex discrimination. After many attempts to reach a solution with management, the workers requested my advice as to whether outside mediation could be imposed upon the situation. I had to advise them that there existed no legal mechanism that could be invoked to force this Senate office to deal with their charge of sex discrimination in pay, although if they worked anywhere else such discrimination could be deemed illegal. The employees decided to request the Senate office to accept outside mediation anyway. This request was not surprisingly denied.

Case 5:

Currently, I represent a former Senate telephone operator who was discharged from the Senate for what she alleges to be her leadership role in attempting to obtain a pay raise for all Senate telephone operators. A recipient of two merit awards during the last 5 years, she was fired after 17 years of service to the Senate, and given no forum to contest her dismissal. She and many of her co-workers believe that it was her efforts on behalf of her co-workers that was the motivation for her

dismissal. Since, as this Committee is aware, there is no vehicle in the Senate to contest such employment practices, we have taken the unusual step of filing complaints with two duly constituted U.S. Senate Committees, the U.S. Senate Select Committee on Ethics and The Senate Committee of Rules and Administration. The substance of the Ethics Committee Complaint is that firing an employee as retaliation for her actions on behalf of co-workers to rectify an unfair employment practice is action that reflects poorly on the Senate. The substance of her complaint in the Rules Committee is that nowhere else in government, except in the Senate, could a person be dismissed from 17 years of loyal service and lose all those accumulated benefits without the right to a hearing.

It is ironic that all Senate and House telephone operators sit in the same room, have their positions regulated by the same published employment guidelines and have the same supervisor, and yet if a House Operator has a complaint, she has an office to go to and file a complaint. The Senate operator with the same complaint must hire an attorney and file suit in the United States District Court for the District of Columbia. It is my hope that by this Committee's actions and with the enactment of this legislation, this inequity will be remedied.

In the spirit of justice which inspired this legislation, I would propose the following additional language in S.1165 §5, line 14:

"Act, and shall assume jurisdiction of all complaints currently filed with any duly constituted U.S. Senate Committee which contains allegations within the purview of this Act."

This small addition will address the inequity that has resulted from only the House of Representatives granting a formal avenue for its employees to contest unfair employment practices.

Linda B. Berg
Attorney at Law
5010 Wisconsin Avenue, N.W.
Suite 118
Washington, D.C. 20016
(202) 895-2609

SURVEY --**Staff of the Committee on Governmental Affairs
and the Senate Black Legislative Staff Caucus****U.S. Senate Personal Staffs and Committee Staffs**

	<u>Total</u>	<u>Blacks</u>	<u>Female</u>
Administrative Assistants	100	0	13
Legislative Directors	100	1	20
Legislative Assistants	622	28	186
Staff Directors of Full Committees	17	2	3
Professional Staff of Committees	882	26	194
Press Secretaries on Personal Staffs	100	1	21

Percentage of Male Employees on Personal Staffs earning in
excess of \$35,000 - 83%

Percentage of Female Employees on Personal Staffs earning in
excess of \$35,000 - 17%

Percentage of Male Employees on Committee Staffs earning in
excess of \$35,000 - 76%

Percentage of Female Employees on Committee Staffs earning in
excess of \$35,000 - 24%

The Washington Times

WOMEN AND BLACKS SCARCE ON SENATE COMMITTEE STAFFS

White males dominate professional positions

Committee	*Total staff	Professional staff		
		Men	Women	Blacks
Agriculture, Nutrition and Forestry	34	11	4	0
Appropriations	76	36	10	0
Armed Services	49	25	5	0
Banking, Housing and Urban Affairs	35	16	4	2
Budget	79	30	13	1
Commerce, Science and Transportation	81	20	15	3
Energy and Natural Resources	34	15	15	0
Environment and Public Works	45	21	10	0
Finance	58	15	12	0
Foreign Relations	64	20	7	0
Governmental Affairs	112	31	15	4
Labor and Human Resources	119	30	22	5
Judiciary	137	40	18	5
Rules and Administration	30	13	7	0
Veterans Affairs	26	8	5	1
Small Business	23	7	4	1
Indian Affairs	16	6	6	0
Intelligence	40	23	3	0
Aging	30	7	4	0
Ethics	9	3	2	0
Joint Economic Committee	49	23	9	3
Joint Committee on Printing	18	12	3	0
	1,182	451	196	25

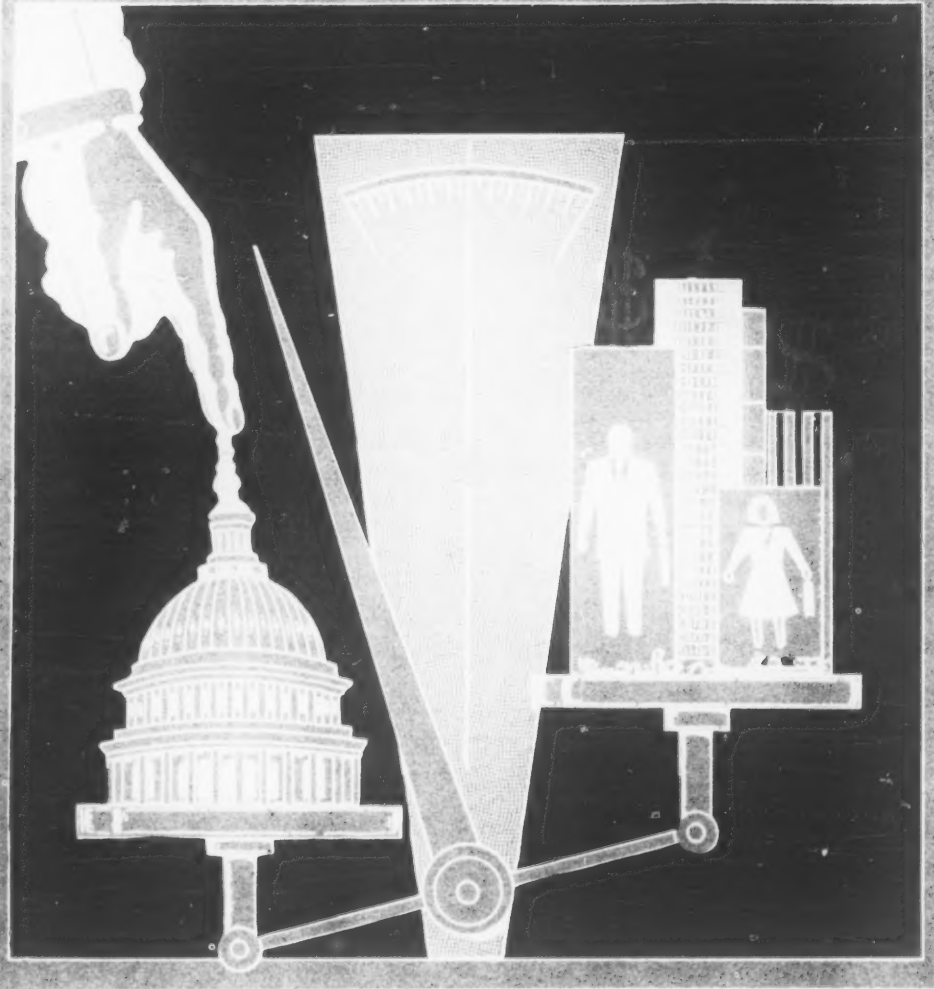
* Total staff figures include professional and clerical positions.

Source: Report of the Secretary of the Senate, fourth quarter, 1987, and Senate Black Legislative Staff Caucus

Extending Equal Employment Opportunity Law to Congress

A Report of the United States Commission on Civil Rights

June 1980



U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

MEMBERS OF THE COMMISSION

Arthur S. Flemming, *Chairman*

Stephen Horn, *Vice Chairman*

Frankie M. Freeman

Manuel Ruiz, Jr.

Murray Saltzman

Louis Nuñez, *Staff Director*

Extending Equal Employment Opportunity Law to Congress

A Report of the United States Commission on Civil Rights

June 1980

LETTER OF TRANSMITTAL

U.S. Commission on Civil Rights
Washington, D.C.
June 1980

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The U.S. Commission on Civil Rights presents to you this report pursuant to Public Law 85-315, as amended.

This legal study analyzes the constitutional issues that are raised by extending equal employment opportunity laws to legislative branch employees. It results from a request from Congress to which the Commission agreed in September 1979.

We have concluded in this report that the Constitution does not preclude Congress from enacting an equal employment opportunity law covering legislative branch employees based on Title VII of the Civil Rights Act of 1964.

We urge your consideration of the analysis presented and ask for your timely action in ensuring implementation of the recommendations made.

Respectfully,
FOR THE COMMISSIONERS

ARTHUR S. FLEMMING

ACKNOWLEDGMENTS

This report was produced under the general supervision of Jack P. Hartog, Assistant General Counsel, and was written by the following attorneys in the Office of the General Counsel: Christopher G. Bell, Phyllis K. Fong, Anne H. Meadows, and Stephen P. O'Rourke. Additional research was performed by Mark Darrell, Gregory Ford, Marc Kranson, and Manuel Romero. The following staff members provided support in preparing the report: Lorraine W. Jackson, Brenda Blount, Stephanie Campbell, Ana Dew, Treola J. Grooms, Mary Grose, Connie Lee, DeBorah Marks, and Gwen Morris. The Commission wishes to thank Professor Robert Cover for his critical review of a draft of this report.

Editorial assistance was provided by Laura Chin of the Publications Management Division, Office of Management. Preparation for publication was the responsibility of Vivian Hauser, Deborah Harrison, and Vivian Washington in the Publications Support Center, Office of Management.

This report was prepared under the overall supervision of Eileen M. Stein, General Counsel.

CONTENTS

Introduction	1
1. Present Congressional Employment Practices	3
Congressional Employers	
Congressional Equal Employment Opportunity Rules	
<i>Davis v. Passman</i>	
2. Separation of Powers Doctrine and Congressional Employment Practices	10
Speech or Debate Clause	
The Undue Disruption Standard	
3. Covering Key Congressional Aides and Advisors	22
4. Principal Constitutional Prerequisites to Judicial and Administrative Enforcement	25
Rules and Statutes	
Appointments Clause Considerations	
Conclusions	33
Recommendations	35
Additional Statement of Vice Chairman Stephen Horn	36

Introduction

In the fall of 1979, Congress asked the U.S. Commission on Civil Rights to conduct a study analyzing the legal issues that could arise from eliminating the present exemption of Congress from Federal equal employment opportunity laws.¹ In response to this request, this report examines whether Congress may constitutionally choose to bring itself within the scope of Title VII of the Civil Rights Act of 1964.² Title VII sets forth this Nation's basic law banning discrimination in employment on the basis of race, color, religion, sex, and national origin.

When enacted, Title VII was limited to the private sector, covering most private employers, labor organizations, and employment agencies.³ In 1972 Congress extended Title VII to include nearly all State and local government employers⁴ and the Federal executive branch.⁵ Legislative and judicial branch employees, however, are generally not covered by Title VII unless they are in the competitive service.⁶ There are, in addition, several limited

categories of employers and employees who are specifically exempted.⁷

Title VII establishes various methods of administrative enforcement of its substantive provisions, principally by the Equal Employment Opportunity Commission,⁸ and provides for judicial review and enforcement of all aspects of compliance with Title VII law.⁹ Because the executive and judicial branches enforce Title VII, significant constitutional separation of powers issues are raised by measures that would subject congressional employment practices to Title VII procedures. This concern over executive or judicial interference with congressional employment relations is particularly acute with respect to those principal congressional staff members who provide direct and personal assistance in the formulation of legislative policy to Members or to committees. This report, therefore, will concentrate on the issue of whether constitutional provisions designed to protect the legislative branch from undue intrusion into its legitimate legislative activi-

¹ This request came during the course of the Commission's authorization process for the fiscal year of 1980. An amendment was first offered by Senator Patrick Leahy to the Senate authorization bill for the Commission, S.721, providing that:

No later than April 1, 1980 the Commission shall study and report to the Congress and the President the legal questions involved in eliminating the legislative branch's exemption from the Civil Rights Act and the Commission shall further in its report recommend the various means to resolve each question.

The Chairman of the Commission subsequently agreed that the Commission would conduct such a study, and this commitment was confirmed in a letter dated Sept. 25, 1979, to the Chairman from Senator Birch Bayh and Representative Donald Edwards. Due to this agreement, Senator Leahy's amendment was dropped and is not part of the Commission's authorization act, Civil Rights Commission Authorization Act of 1979, Pub. L. No. 96-81, 96th Cong., 1st Sess. (1979).

² 42 U.S.C. §§2000e-2000e-17 (1976).

³ 42 U.S.C. §2000e(a), (b), (c), and (d) (1976).

⁴ 42 U.S.C. §2000e(a), (b), and (h) (1976).

⁵ 42 U.S.C. §2000e-16 (1976). The coverage of White House employees is discussed in the text accompanying notes 6 and 7 in chapter 3.

⁶ 42 U.S.C. §2000e-16(a) (1976). The precise scope of this section is unclear; some employees within some congressional service agencies may be covered by Title VII. See discussion in chapter 1, note 20, and chapter 3, note 5.

⁷ The following are specifically exempted from the coverage of Title VII: Indian tribes (42 U.S.C. §2000e(b)); bona fide tax-exempt, private membership clubs (*id.*); employers with less than 15 employees (*id.*); State or local elected officials, their personal staffs, policy level appointees, and immediate legal advisers (42 U.S.C. §2000e(f)); employers of aliens whose employment is outside the United States and specified American territories and protectorates (42 U.S.C. §2000e-1); religious organizations who employ individuals to perform work connected with the carrying out of their activities (*id.*).

⁸ See 42 U.S.C. §2000e-5. The Department of Justice, for example, is empowered to sue State and local governmental agencies and private employers who resist the full enjoyment of Title VII rights. 42 U.S.C. §2000e-5(f), 2000e-6.

⁹ See 42 U.S.C. §2000e-5(f), (g), §2000e-6(b).

ties by the executive or judicial branches of government prohibit external enforcement of antidiscrimination requirements with respect to congressional employees.

To provide the factual setting for this discussion, chapter 1 distinguishes the various employing units within Congress, explains existing congressional rules prohibiting employment discrimination, and discusses the Supreme Court's recent decision in *Davis v. Passman*,¹⁹ which gives congressional employees the right to sue for damages for unconstitutional employment discrimination.

Chapter 2 then addresses the constitutional separation of powers issues that should be considered if equal employment opportunity laws are extended to Congress. The chapter first discusses the speech or

debate clause protections that shield individual Members of Congress and then discusses the broader issues of coordinate branch integrity that are embodied in the separation of powers doctrine. Chapter 3 examines the particular factual and constitutional considerations with respect to extending equal employment protections to those congressional employees who are most directly involved in the formulation of legislative policy. Chapter 4 then discusses the additional constitutional requirements that must be met if judicial and administrative enforcement of legislative branch equal employment rights is to be provided. Finally, the report sets out its conclusions and recommends an approach that resolves the constitutional issues in this area.

¹⁹ 442 U.S. 228 (1979).

1. Present Congressional Employment Practices

The legislative branch employs approximately 40,000 people. Many work in Members' offices and for congressional committees, but the majority work in service and legislative support units as diverse as the Architect of the Capitol, the Library of Congress, the Government Printing Office, or the Sergeants at Arms of either chamber, which provide services to the Senate and House of Representatives.¹ There are no uniform personnel policies and practices governing their employment. Instead according to a congressional study, the personnel system is "highly fragmented" and "has developed in an ad hoc and unplanned manner." Where personnel policies exist, they are determined by the individual employing units.² Attempting to determine with any precision the numbers of persons in different positions is difficult. Staff totals for the Senate, the House, and the miscellaneous offices of

Capitol Hill vary according to definition and accounting methods.³

Assessments of congressional employment patterns by race and sex in the legislative branch strongly suggest that employment discrimination is a serious problem on Capitol Hill. On the basis of two work force surveys, the House Obeys Commission⁴ presented data documenting significant underrepresentation and underutilization of women and blacks as employees of the House of Representatives in general and on Member and committee staffs in particular. The higher paying, more responsible or professional positions were held by white males.⁵ Even when educational level or job title⁶ was the same, a consistent pattern of significant disparities in salary appeared by race and sex.⁷ The conclusion that women and blacks are underrepresented and underutilized in legislative branch employment is also supported by numerous private surveys that

¹ C. Brownson, *Congressional Staff Directory*, Preface (21st ed. 1979) (hereafter cited as *Congressional Staff Directory*).

² House Commission on Administrative Review, *Administrative Reorganization and Legislative Management*, H.R. Doc. No. 95-232, 95th Cong., 1st Sess. 81 (1977) (hereafter cited as *Obeys Commission Report*).

³ *Congressional Staff Directory*, *supra* note 1, states that:

For February 1978, the Secretary of the Senate listed 6,308 Senate employees: 1,276 committee employees and 5,032 others.

For the same period, the Clerk of the House reported there were 1,994 committee employees, 6,847 employees of the Members in their Washington or District offices (clerk hire), and 1,910 other employees for a total of 10,751.

For the month of November, 1978, the U.S. Civil Service Commission supplies the following figures:

U.S. Senate—6,540

U.S. House of Representatives—11,384

Commission on Security and Cooperation—13

U.S. Congress (total)—17,937

Architect of the Capitol—2,239

Botanic Garden—37

Congressional Budget Office—203

Copyright Royalty Tribunal—10

Cost Accounting Standards Board—32

General Accounting Office—5,382

Government Printing Office—7,375

Library of Congress—5,180

Office of Technology Assessment—150

U.S. Tax Clerk—197

Representative Morris Udall, in remarks to the House, stated that there are presently over 14,000 employees of Congress, a figure that does not include employees of such support agencies as the General Accounting Office, which, Representative Udall stated, has 5,275 employees, the Library of Congress with 4,200 employees, and the Congressional Research Service with 860 employees. 126 Cong. Rec. E2526 (daily ed. May 21, 1980) (remarks of Rep. Udall).

⁴ See note 2, *supra*. See also Senate Comm. on Governmental Affairs, Lee Metcalf Fair Employment Relations Resolution, S. Rep. No. 95-729, 95th Cong., 2d Sess. 15 (1978) (hereafter cited as *Fair Employment Relations*).

⁵ *Id.* at 94-95, 104.

⁶ *Id.* at 89.

⁷ *Id.* at 96-97, 106.

have been conducted and reported in the past several years.⁸

Congressional Employers

Members of Congress are authorized,⁹ within certain limitations, to hire personal staff employees and to set salaries and conditions of employment as they see fit.¹⁰ Recruitment is informal in both House and Senate, especially for professional staff, and is based largely on a "grapevine" system of insiders.¹¹ Few offices have salary structures tied to job descriptions, and leave policies and work schedules vary from office to office.¹² Members may fire employees at any time, with or without cause.¹³

As in Members' offices, personnel practices in congressional committees vary. House and Senate rules provide that professional and clerical committee staff be appointed by majority vote of the committee, with provisions to ensure staff for committee Members of the minority party and for subcommittee chairmen and ranking minority Members. Maximum levels for salaries are established, and committee chairmen have the authority to set all staff salaries, although in practice the employing Member determines the salaries of his or her staff.¹⁴ Most committees have no formal job descriptions or salary structures, and conditions of employment change from committee to committee. Recruitment, while sometimes more formal than in Members' offices because of the need for subject-matter experts, is generally inhouse and ad hoc. Evaluations

are usually informal and are controlled by the senior committee Members.¹⁵ The employment of committee staff may be terminated at the discretion of committee and subcommittee chairmen and ranking minority Members, subject to majority vote of committee Members, or in the case of minority staff, of minority committee Members.¹⁶

There are two types of units that provide support services to Congress. The first is made up of the offices of congressional officers,¹⁷ such as the Clerk of the House and the Secretary of the Senate; and the second type includes statutorily created congressional agencies, such as the Congressional Budget Office and the General Accounting Office.¹⁸ Congressional officers are elected by majority vote in the House and in the Senate.¹⁹ The chief administrators of the agencies are appointed in a variety of ways. Some are appointed by the President, either with or without the advice and consent of the Senate. Others are appointed by oversight committees of Congress or by the Speaker of the House and the President *pro tempore* of the Senate.²⁰

Compared to Member and committee staffs, service and legislative units tend to be more bureaucratic and hierarchical. Operated independently from one another, these numerous units vary in size and complexity. In the House alone, for example, there are more than 40 service and legislative support units.²¹ To further complicate matters, those who have nominal jurisdiction over a unit or set of units

⁸ For example, a survey conducted by the *National Journal* "shows that the professional staffs of Congressional committees are dominated by white males, with only 27 percent women and 5 percent members of minority groups." Daniel Rapoport, "The Imperial Congress: Living Above the Law," *National Journal*, vol. 22 (June 2, 1979), p. 913. Similar statistics indicating racial discrimination were published in a 1977 Cox newspaper article. Of the 340 employees earning more than \$30,000 a year on 22 standing House committees, only 15 were black, and 10 of those committees employed no black professionals. Alexander, "Discrimination in Hiring and Pay Starts at the Top . . . on Capitol Hill," reprinted in *Handling of Discrimination Complaints in the Senate: Hearings Before the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. (1977)*. The Ad Hoc Committee of Black Senate Legislative Staff estimated that of the approximately 1,100 professional staff employed by Senators and Senate committees, less than 30 were black. *Id.* at 34 (testimony of Alan G. Boyd and Loftus C. Carson III). In its 1974 study, *Sexists in the Senate? A Study of Differences in Salary by Sex*, the Capitol Hill Women's Political Caucus found that the median salary for women was \$10,026 and for men \$17,650. At salary levels above \$18,000 a year, the median salary for women was \$22,687, while for men it was \$28,091. An update of this survey in 1977 indicated that there was little if any improvement in the differentials. *Id.* at 44-71.

⁹ Obey Commission Report, *supra* note 2, at 82.

¹⁰ *Id.* at 90-91; Fair Employment Relations, *supra* note 4.

¹¹ Obey Commission Report, *supra* note 2, at 82, 95.

¹² 2 U.S.C. §92 (1976); Obey Commission Report, *supra* note 2, at 97; Fair Employment Relations, *supra* note 4, at 20.

¹³ Jefferson's Manual and Rules of the House of Representatives, H.R.

Doc. No. 95-403, 96th Cong., 1st Sess. §735 (1979) (hereafter cited as Rules of the House); Senate Comm. on Rules and Administration, Standing Rules for Conducting Business in the United States Senate, 96th Cong., 1st Sess., Rule XXXI (Comm. Print 1979) (hereafter cited as Senate Rules). Senate Rule XXXI(c) allows minority Members to determine compensation for minority staff.

¹⁴ Obey Commission Report, *supra* note 2, at 102-09.

¹⁵ Rules of the House, *supra* note 8; Senate Rules, *supra* note 8.

¹⁶ House rules provide for the following officers: Clerk, Sergeant-at-Arms, Doorkeeper, Postmaster, and Chaplain. Rules of the House, *supra* note 8, at §635. Senate rules do not list officers, but comparable offices exist. See, e.g., 2 U.S.C. §24, 51, 60-1 (1976).

¹⁷ See, e.g., 2 U.S.C. §601(a)(1) (1976) (establishing the Congressional Budget Office); 31 U.S.C. §41 (1976) (establishing the General Accounting Office).

¹⁸ Rules of the House, *supra* note 8, §636.

¹⁹ See, e.g., 44 U.S.C. §301 (1976), which provides that the President shall appoint the Public Printer, with the advice and consent of the Senate, to administer the Government Printing Office; 40 U.S.C. §162 (1976), which provides for the appointment by the President, without a requirement that it be made with the advice and consent of the Senate, of the Architect of the Capitol; 40 U.S.C. §216 (1976), which provides for a Superintendent of the Botanic Garden to be under the direction of the Joint Committee on the Library; and 2 U.S.C. §601(a)(2) (1976), which provides that the Director of the Congressional Budget Office be appointed by the Speaker of the House and the President *pro tempore* of the Senate, after considering the recommendations of the House and Senate Budget Committees.

²⁰ Obey Commission Report, *supra* note 2, at 84.

do not necessarily have complete control over its operation.²¹ Nonetheless, personnel policies tend to be relatively formal within many of the units.

Each officer of Congress has authority to determine job qualifications, supervise, remove, or otherwise discipline his or her staff.²² The authorizing statutes for other service units usually set out their personnel policies. Recruitment and hiring policies vary according to the function of the service unit. Some positions are filled through the patronage system, while for others there are formal recruiting procedures based on established job qualifications.²³

Congressional Equal Employment Opportunity Rules

Title VII of the Civil Rights Act of 1964 protects employees in the legislative and judicial branches who are in the "competitive service,"²⁴ or who work in the Library of Congress²⁵ or the General Accounting Office,²⁶ as well as employees in the executive branch, from discrimination based on race, color, religion, sex, or national origin. Although Title VII thus applies to approximately half of the employees of legislative branch service and support units because they are specifically covered by statute or have positions in the competitive service, Title VII does not cover employees of congressional committees or Members' staffs.²⁷

Both the House and Senate have enacted rules of conduct that prohibit discriminatory employment

practices, but these rules do not have the force of law.²⁸ Rule XLIII, Clause 9, of the House Code of Official Conduct bars Members, officers, and employees from discriminating on the basis of race, color, sex, or national origin against staff or job applicants.²⁹ The House Commission on Administrative Review, commonly known as the Obey Commission, found in 1977 that no Member had ever been charged with violation of the rule. The Commission's report speculated that this reflected a lack of discrimination in the majority of House offices, but noted that it would be "very difficult for any non-Member—in this case an employee alleging that his or her rights under this rule have been violated by a Member—to bring a case" before the appropriate committee for review.³⁰ The rule may be invoked only by a Member or by an individual who first has submitted his or her complaint to at least three House Members who have refused in writing to transmit the complaint to the House Committee on Standards of Official Conduct. The Committee, after notice and a hearing on the complaint, may recommend, by majority vote, referral to the full House for appropriate action.³¹

Rule L of the Senate's Code of Official Conduct prohibits discriminatory employment practices by Senators, officers, or employees based on race, color, religion, sex, national origin, age, or state of physical handicap.³² The rule was adopted overwhelmingly as part of an ethics resolution and went

²¹ House Commission on Administrative Review, Final Report, H.R. Doc. No. 95-272, 95th Cong., 1st Sess. 104 (1977).

²² 2 U.S.C. §60-1 (1976); Rules of the House, *supra* note 8, §636.

²³ Obey Commission Report, *supra* note 2, at 110.

²⁴ 42 U.S.C. §2000e-16 (1976). The "competitive service" includes most civil service positions in the executive branch and those civil service positions not in the executive branch that are specifically included by statute, as well as statutorily included positions in the District of Columbia government. 5 U.S.C. §2102 (1976). The question of whether a particular congressional support unit is covered by Title VII requires determining whether its positions are in the competitive service.

Employees of the Commission on Security and Cooperation (with a few exceptions), Botanic Garden, Congressional Budget Office, Copyright Royalty Tribunal, and Office of Technology Assessment, and approximately half of the employees of the U.S. Tax Court, are not in the competitive service and not covered by Title VII. See Memorandum, "Legislative Branch Employees in the Competitive Service" (June 20, 1980), Office of the General Counsel, U.S. Commission on Civil Rights (on file at the Office of the General Counsel) (hereafter cited as Staff Memorandum).

Whether some or all Government Printing Office employees are in the competitive service and therefore covered by Title VII is unclear. Although the recent decision in *Thompson v. Boyle*, 21 FEP Cases 57 (D.D.C. 1980), applied Title VII law to some GPO employees, GPO stipulated for the purposes of that case alone that it did not dispute that it has positions in the competitive service. See Staff Memorandum, *supra*. The question has not yet been resolved, as provisions in the Kless Act, 44 U.S.C. §305 (1976), indicate that GPO employees may not be in the competitive service.

²⁵ Congress exempted the Library of Congress from Civil Service Commission enforcement of the antidiscrimination provision and vested that

authority in the Librarian of Congress (42 U.S.C. §2000e-16 (b) (1976)), apparently because questions were raised concerning the propriety of delegating to the executive branch oversight of an arm of Congress. See 118 Cong. Rec. 4921 (1972).

²⁶ Confusion has surrounded Title VII's applicability to the General Accounting Office, but the issue has been resolved by enactment of the General Accounting Office Personnel Act of 1980, Pub. L. No. 96-191, 94 Stat. 27 (to be codified in scattered sections of 5, 31 U.S.C.). See chapter 4 for a discussion of the act's provisions.

²⁷ See Staff Memorandum, *supra* note 24.

²⁸ To have such force, congressional enactments must be sent to and approved by the President; violators of congressional rules, however, may be reprimanded, disciplined, or expelled from Congress. See discussion of congressional rules in chapter 4, *infra*; Comment, *The Last Plantation: Will Employment Reform Come to Capitol Hill?* 28 Cath. U. L. Rev. 271, 284 n.78 (1979) (hereafter cited as "The Last Plantation").

²⁹ Clause 9 of Rule XLIII, Rules of the House, *supra* note 13, §939 provides as follows:

A Member, officer or employee of the House of Representatives shall not discharge or refuse to hire any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

The rule was adopted as part of H.R. Res. 5, 94th Cong., 1st Sess., 121 Cong. Rec. 33 (1975).

³⁰ Obey Commission Report, *supra* note 2, at 99.

³¹ Congressional Research Service, Library of Congress, *Equal Employment Opportunity and the United States Congress* 11 (1978) (hereafter cited as *Equal Employment Opportunity and Congress*).

³² Senate Rules, *supra* note 13, Rule L (50) provides as follows:

into effect on January 3, 1979. The Senate Committee on Governmental Affairs found, nonetheless, that the rule would not be "an effective deterrent to employment discrimination" unless procedures to resolve complaints were set up.³³ To date, no such procedures have been established.

The Senate also has a Standing Order providing for the appointment of Senate pages, elevator operators, Post Office employees, and Capitol policemen without discrimination on the basis of sex. An exception is made in the case of pages, however. Until a planned dormitory is constructed to house them, women cannot be pages unless their sponsoring Senators pledge in writing to be responsible for their transportation to and from the Senate and to guarantee their "safety, well-being, and strict supervision" while they are away from local residences.³⁴

Other House and Senate rules specify that professional committee staff shall be hired "solely on the basis of fitness to perform the duties of their respective positions,"³⁵ and a number of committees have undertaken affirmative action in their recruitment.³⁶

Enforcement, however, remains the chief obstacle to overcoming such discrimination as may exist on Capitol Hill. Grievance procedures are largely informal and usually handled internally within a given committee or administrative unit.

In the House, interested Members have informally banded together to form a Fair Employment Practices Committee, which exists outside the formal rules of the House and is available to those who wish to make use of its processes. A panel of three Members and three staff persons hears grievances and counsels employees or applicants who claim they have been discriminated against on the basis of race, color, religion, sex, national origin, age, parental or marital status, or handicap. The effectiveness of the Committee is limited because it can only hear

grievances against Members who have signed a nondiscrimination pledge and agreed to participate. Furthermore, Members may reject the Committee's disposition of complaints against them.³⁷

Several other attempts have been made to create enforcement mechanisms that would provide a means to eliminate employment discrimination in Congress. For example, the Obey Commission recommended redesigning the rarely used Congressional Placement Office, requiring it to establish affirmative action plans and to set up grievance procedures. The Commission also recommended the creation of a fair employment practices panel,³⁸ but its recommendations were not adopted.³⁹ Resolutions were introduced to implement Rule XLIII and Rule L in the House and Senate, respectively, but neither was enacted.⁴⁰ Finally, a bill currently pending in the Senate would eliminate the exemption of Congress from six Federal labor and privacy statutes, including Title VII of the Civil Rights Act of 1964.⁴¹

Davis v. Passman⁴²

Lacking effective antidiscrimination provisions by congressional rule or statute, congressional employees complaining of employment discrimination have turned to the courts. From February to July 1974, Shirley Davis was a deputy administrative assistant to then Congressman Otto E. Passman of Louisiana. She was terminated by the Representative because "it was essential that the understudy to my administrative assistant be a man."⁴³ Davis filed suit, *Davis v. Passman*, alleging that her termination on the basis of her sex was a violation of the equal protection component of the due process clause of the fifth amendment.

No Member, officer, or employee of the Senate shall, with respect to employment by the [Senate] or any office thereof—

- (a) fail or refuse to hire an individual;
- (b) discharge an individual; or
- (c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment

on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.

³³ Fair Employment Relations, *supra* note 4, at 5.

³⁴ Senate Manual, S. Doc. No. 95-1, 95th Cong., 1st Sess. §79.7 (1977).

³⁵ Rules of the House, *supra* note 13, §733(d); Senate Rules, *supra* note 13, Rule XXXI, cl. 1 (a).

³⁶ Obey Commission Report, *supra* note 2, at 104.

³⁷ *Equal Employment Opportunity and Congress*, *supra* note 31, at 12-13. See also, *Handling of Discrimination Complaints in the Senate: Hearing Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess., 29-31 (1977) (statement of Rep. Charles Rose).

³⁸ Obey Commission Report, *supra* note 2, at 114-19.

³⁹ See "The Last Plantation," *supra* note 28, at 284 n. 77.

⁴⁰ H.R. Res. 292, 96th Cong., 1st Sess., 125 Cong. Rec. H3906 (daily ed. May 30, 1979); S. Res. 431, 95th Cong., 2d Sess., 124 Cong. Rec. §55018 (daily ed. Apr. 7, 1978).

⁴¹ S. 1112, 96th Cong., 1st Sess., 125 Cong. Rec., S5658-64 (daily ed. May 10, 1979). S. 1112 would amend the Civil Rights Act of 1964, §717, 42 U.S.C. §2000e-16 (1976); National Labor Relations Act, §§2(2), 7, 29 U.S.C. §§152(2), 157 (1976); Fair Labor Standards Act, §3(e)(2)(A)(iii), 29 U.S.C. §203(e)(2)(A)(iii) (1976); Occupational Safety and Health Act of 1970, §§3(5), 3(6), 29 U.S.C. §§652(5), 652(6) (1976); 5 U.S.C. §552(c) (1976); Social Security Act, §210(a)(6), 42 U.S.C. §410(a)(6) (1976); I.R.C. §3121(b)(6).

⁴² 442 U.S. 228 (1979).

⁴³ *Id.* at 230-231 n.3 (quoting letter from Otto Passman to Shirley Davis).

After extensive lower court litigation⁴⁴ the Supreme Court, in a narrow five-to-four decision⁴⁵ that left many important questions unanswered, ruled that a cause of action for damages might be pursued against a Member of Congress directly based on the due process clause of the fifth amendment of the Constitution by a congressional employee alleging unconstitutional employment discrimination.⁴⁶

The Court first held that the due process clause of the fifth amendment confers "a Federal constitutional right to be free from gender discrimination" so long as such discrimination is not "substantially related" to the achievement of "important governmental objectives."⁴⁷ The Court then held that inasmuch as determining if a constitutional violation occurred falls within "the traditional role of the courts to interpret the law,"⁴⁸ "litigants who allege that their own constitutional rights have been violated and at the same time have no effective means other than the judiciary to enforce those rights" are appropriate parties to invoke the jurisdiction of the judiciary.⁴⁹ Relying on the earlier case of *Bivens v. Six Unknown Federal Narcotics Agents*,⁵⁰ which permitted a cause of action for damages directly under the fourth amendment, the Court established a *Bivens*-type right to sue for aggrieved legislative branch employees.

⁴⁴ The district court dismissed Davis' complaint on the grounds that the conduct complained of was not unconstitutional and that she had no private right of action directly under the fifth amendment. *Davis v. Passman*, 544 F.2d 865, 868 (5th Cir. 1977). A panel of the Fifth Circuit Court of Appeals reversed the district court, holding that the allegations in Davis' complaint stated a cause of action for damages for unconstitutional sex discrimination and that the claim could be brought directly under the fifth amendment of the Constitution. *Id.* at 868. The panel concluded that the speech or debate clause would not protect Representative Passman from liability if Davis proved the truth of her allegations, reasoning that staff dismissals were not integral to the legislative process, but at best merely tangential. *Id.* at 868-74, 881-82. The court of appeals, sitting *en banc*, reversed the panel decision and found that Davis had no cause of action under the fifth amendment and, therefore, did not reach the merits of the case or discuss the applicability of the speech or debate clause. 571 F.2d 793 (5th Cir. 1978) (*en banc*).

⁴⁵ Justice Brennan wrote the opinion of the Court in which Justices White, Marshall, Blackmun, and Stevens joined. Chief Justice Burger and Justices Stewart and Powell each wrote dissenting opinions, all joined by Justice Rehnquist. The Chief Justice and Justice Powell also joined in each other's opinions.

⁴⁶ 442 U.S. at 244.

⁴⁷ *Id.* at 234-35. The Court expressed no view as to whether such requirements were met in the case before it. *Id.* at 235 n.9.

⁴⁸ *Id.* at 236 n.11, quoting from *Baker v. Carr*, 369 U.S. 186, 217 (1962). "[I]n the absence of a textually demonstrable commitment of [an] issue to a coordinate political branch we presume that justiciable constitutional rights are to be enforced through the courts." *Id.* at 242, quoting in part from *Baker v. Carr*, 369 U.S. at 217. See note 44, *supra*, and accompanying text.

⁴⁹ 442 U.S. at 242-44. The Court explained in some detail Ms. Davis' claim that congressional rules are ineffective remedies to vindicate her rights. *Id.* at 243 n.21.

⁵⁰ 403 U.S. 388 (1971). Ms. Davis was forced to rely directly on the Constitution because no statute exists under which she could press her

Congressman Passman had argued that the case was nonjusticiable because the respect due the legislative branch by the judiciary under the doctrine of separation of powers prohibited the courts from hearing the case.⁵¹ The Supreme Court disagreed. It ruled that the requirements of the speech or debate clause of Article I, §6, fully expressed the limits of such separation of powers concerns.⁵² To the extent that such speech or debate immunity exists, legislators would have absolute immunity from such lawsuits.⁵³ The Court, however, then refrained from considering the application of the speech or debate clause.

Davis v. Passman, even assuming that the speech or debate clause poses no barrier, leaves many other unanswered questions. These questions could easily be resolved by a statute that extended the protection of Title VII to congressional employees. In the absence of such a statute, however, the answers to these questions will have to await further expensive and time-consuming constitutional litigation.

For instance, *Davis v. Passman* did not consider whether Members of Congress have either absolute or qualified judicially created immunity from suit for employment decisions taken in the scope of their

claim. It should be noted that under limited circumstances, a legislative branch employee may bring a civil action under the 1866 Civil Rights Act, 42 U.S.C. §1981 (1976). Section 1981 was unavailable to Ms. Davis because by its terms it does not extend to claims of discrimination based on sex. The 1866 Civil Rights Act was enacted under Congress' authority to enforce the 13th amendment and generally prohibits discrimination on the basis of race, alienage, and national origin. See *Runyon v. McCary*, 427 U.S. 160 (1976); *Gwerra v. Manchester Terminal Corp.*, 498 F.2d 641, 653-54 (5th Cir. 1974); *Cubai v. Rapid American Corp.*, 420 F. Supp. 663 (E.D. Pa. 1976). Some courts have found that section 1981 protects Federal employees from such discrimination in the making and enforcement of employment contracts with the Federal Government. *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974); *Penn v. Schlesinger*, 490 F.2d 700, 701-02 (5th Cir. 1974), *rev'd on other grounds*, 497 F.2d 970 (1974) (*en banc*). But see *Cozad v. Johnson*, 397 F. Supp. 1235 (W.D. Okla. 1975).

Remedies available in section 1981 actions are generally broader than those available in constitutional litigation, however, as plaintiffs may recover both equitable relief (back pay, reinstatement, and decrees for affirmative action) and legal relief (compensatory and punitive damages), as well as attorney's fees. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, §1, 90 Stat. 2641 (codified at 42 U.S.C. §1988 (1976)). Sovereign immunity, however, will generally bar back pay and compensatory damage awards against the United States. *Penn v. Schlesinger*, 490 F.2d 700, 704-05 (5th Cir. 1973), *rev'd on other grounds*, 497 F.2d 970 (1973) (*en banc*); 28 U.S.C. §2412 (1976). Sovereign immunity will also bar attorney's fee awards against the United States. *Andrelli v. United States*, 609 F.2d 514 (D.C. Cir. 1979), *petition for cert. pending*, No. 79-1542; *Shannon v. Dep't of Housing and Urban Development*, 577 F.2d 854, 855-56 (3d Cir.), *cert. denied*, 439 U.S. 1002 (1978). These issues are discussed further in the text accompanying notes 54-58, *infra*.

⁵¹ 442 U.S. at 235 n.11.

⁵² *Id.* at 236 n.11.

⁵³ The doctrine of separation of powers and the speech or debate clause are discussed at length in the next chapter.

official duties similar to the immunities enjoyed by executive branch officials.⁵⁴ If the good faith immunity defense is available to defendants whose personnel actions are attacked as unconstitutional, and the recent case of *Carlson v. Green* suggests that it is,⁵⁵ it will constitute a burden on congressional victims of employment discrimination not imposed on employees who can vindicate their rights under Title VII.

In addition, the Court expressly limited its holding and analysis to the appropriateness of a damage remedy⁵⁶ and did not discuss the possibility that equitable remedies, such as reinstatement, might also be appropriate in constitutional litigation.⁵⁷ Generally, the Federal courts have been extremely reluctant, in the few cases where the issue has been squarely presented, to order coercive remedies or issue equitable decrees in cases involving Federal personnel matters where authority to do so has not been statutorily provided, in part because of the potentially disruptive effect such decrees could cause.⁵⁸

⁵⁴ Qualified "good faith" immunity protects defendant government officers (in varying scope dependent upon their responsibilities) who act in good faith that is reasonable in light of all the circumstances existing at the time of the violation. *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974), unless either the plaintiff has, at the time of the violation, a "clearly established" constitutional right and the official knows or should know that his or her action will violate that right, or the official acts, with malicious intent, to cause a constitutional deprivation or other injury. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978), quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The doctrine of qualified immunity, which was originally available only to State officials sued for constitutional violations under 42 U.S.C. §1983, has recently been extended to apply to Federal executive officials exercising similar discretionary functions under color of Federal law. *Butz v. Economou*, 438 U.S. 478 (1978). The recent opinion in *Owen v. Town of Independence*, 100 S. Ct. 1398 (1980), holds that the qualified good faith immunity defense is not available to a municipality sued under 42 U.S.C. §1983. The Court stated, however, that suit against government officers sued in their individual capacity differs significantly from a suit in which liability lies directly against the governmental entity. *Id.* at 1409 n.18.

⁵⁵ 100 S. Ct. 1468 (1980). The qualified immunity afforded Federal executive officials "provides adequate protection" against the possibility that defending against constitutional claims might inhibit the efforts of officials to perform their duties. *Id.* at 1472 (1980).

⁵⁶ The Court noted that respondent *Pasman* was no longer a Congressman, that no other alternative relief was available, and that a damage remedy was not prohibited by Congress. 442 U.S. at 245-47.

⁵⁷ *Id.* at 245.

⁵⁸ The Supreme Court, in reviewing a temporary injunction barring discharge of probationary executive branch employees, has noted:

The District Court, exercising its equitable powers, is bound to give serious weight to the obviously disruptive effect which the grant of the temporary relief awarded here was likely to have on the administrative process. When we couple with this consideration the historical denial of all equitable relief by the Federal courts in cases such as *White v. Berry*, the well-established rule that the government has traditionally been granted the widest latitude in the dispatch of its own internal affairs, and the traditional unwillingness of courts of equity to enforce contracts for personal service either at the behest of the employer or the employee, we think that the Court of Appeals was quite wrong in routinely applying to this case the traditional standards governing more orthodox "stays."

Sampson v. Murray, 415 U.S. 61, 83-84 (1973) (citations omitted).

This latitude the courts grant the executive branch in personnel matters is likely to be extended to the legislative branch also.

There are, moreover, additional problems that will confront legislative branch employees who seek to bring a *Davis*-type action.⁵⁹ In some circumstances, a suit will not survive because complete and adequate relief would require the joining of an indispensable party such as a congressional committee Member who is absolutely immune from suit.⁶⁰ In other circumstances, the doctrine of sovereign immunity may bar effective relief even though the plaintiff can show that a Federal official has acted unconstitutionally or that his or her actions exceeded the scope of his or her authority.⁶¹ Seeking damage relief against persons in their individual capacity, on the other hand, raises other problems, as not all congressional employers have the financial means to pay large judgments.⁶² Finally, attorney's fees are not provided the successful constitutional plaintiff unless authorized by statute,⁶³ as they are the Title VII plaintiff.⁶⁴

Adequate, efficient, and inexpensive resolution of employment discrimination claims by legislative

⁵⁹ The attorney who represented the plaintiff in *Davis v. Pasman* testified, at a Senate subcommittee hearing which was considering extending Title VII protections to congressional employees, as to her belief that a *Davis v. Pasman*, *Bivens*-type suit was an inadequate remedy for vindicating employment discrimination rights. To Eliminate Congressional and Federal Double Standards: Hearings on S. 1112 Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 96th Cong., 1st Sess. 34-37 (1979) (statement of Sara F. Shtasel).

⁶⁰ See Fed. R. Civ. P. 19(b). Failure to join as a defendant one who is necessary and indispensable for obtaining complete and comprehensive relief may lead to dismissal of the lawsuit. This presents unique difficulties to many employees of Congress who may have otherwise meritorious complaints of employment discrimination because responsibility for hiring and firing committee staff, or staff on certain services units of either or both Houses of Congress, is accomplished by means of a vote of a committee. As discussed in chapter 2, congressional committee Members are absolutely immune, under the speech or debate clause, for legislative acts such as voting on committee resolutions, and employees will be limited to actions for damages against those agents who, in their individual capacities, have the duty of executing the committee resolution.

⁶¹ Generally, the doctrine of sovereign immunity states that the United States and its officers cannot be sued without their consent. A suit is considered to be against the sovereign when "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or restrain the government from acting or compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Two recognized exceptions to this general rule have been carved out by the Supreme Court, however, to allow suits against officers who have acted beyond their statutory powers, and suits against officers who have acted within their authority but unconstitutionally. *Id.* at 621-22. Even where these exceptions apply, though, sovereign immunity may limit the kinds of relief a court may grant. "[I]f the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property," it will be precluded. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949).

⁶² Even if the defendant has sizable personal assets that can theoretically be used to satisfy a judgment, the prospects of recovery are diminished because the wages of Federal employees may not ordinarily be garnished. See 64 Cornell L. Rev. 667-68.

⁶³ *Alyaska Pipeline Co. v. Wilderness Society*, 42 U.S. 240 (1975).

⁶⁴ 42 U.S.C. §2000e-5(k) (1976).

branch employees requires appropriate congressional action.²² Thus, the next question that must be addressed is whether any constitutional consider-

²² If such a statute is enacted explicitly providing exclusive, effective, and comprehensive relief for claims of employment discrimination, it would be held by the Supreme Court to be an exclusive remedy. See *Carlson v.*

ations exist which would bar Congress, as a matter of law, from extending protections against unlawful employment discrimination to its employees.

Green, 100 S. Ct. 1398 (1980); *Brown v. Adm'r of Gen. Servs.*, 425 U.S. 820 (1975).

2. Separation of Powers Doctrine and Congressional Employment Practices

The Constitution accords Congress certain powers and its Members certain privileges in order that the elected representatives of the people may go about their public business without distraction from vexatious lawsuits and without the coercive control and oversight of Presidents and the courts. These laudable aims have recently come into conflict with other provisions of the Constitution, specifically the right under the fifth amendment to be free from unconstitutional employment discrimination, and the national policy, as embodied in civil rights laws, to eliminate employment discrimination. Resolution of the conflict between these competing policies turns upon the constitutional doctrine of separation of powers.

The separation of powers doctrine is not codified in any one clause of the Constitution as a prohibition on actions, an affirmative grant of authority, or a specifically conferred right. It is, instead, the underlying principle of the American form of constitutional government and as such is supported by numerous provisions in the Constitution granting certain powers of government to each branch while protecting each branch in the exercise of its powers. Thus, the Constitution specifically provides Congress with the power to regulate its own proceedings,¹ appoint its own officers,² and discipline its own Members³ without assistance or interference from the other two branches. This is not to imply that the Constitution requires that the three branches operate as hermetically sealed compartments. To the contrary, there is a system of "checks and balances" estab-

lished to preserve the powers, and the exercise of these powers, of each branch of government from domination by another branch. As will be discussed in more detail later, the three branches are intended to interact in exercising their respective powers and are permitted to seek the assistance of another branch in performing their constitutionally assigned functions.

Where Congress by legislation seeks the assistance of the executive and judicial branches in providing employees of the legislative branch with equal employment opportunity, questions of constitutional dimension should be considered. The separation of powers doctrine serves to protect Congress as an institution not only from gaining too much power over the other branches, but also from losing too much power to them. If the authority given to the other branches by such equal employment opportunity legislation were so sweeping that it would "unduly disrupt" the constitutional functions of the Congress as an institution, such legislation could not stand.⁴

Yet the Framers of the Constitution were not satisfied that the integrity of the legislative process was ensured merely by establishing a tripartite government. They provided specific privileges to individual Members of Congress so that they might not, one by one, fall prey to control by the President or the courts and thereby weaken the integrity of the legislative process. Members are generally protected

¹ U.S. Const. art. I, §5, cl. 2.

² *Id.* §2, cl. 6; §3, cl. 5.

³ *Id.* §5, cl. 2.

⁴ *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 441-46 (1977). See also *Buckley v. Valeo*, 424 U.S. 1, 119-24 (1976).

from arrest while attending or traveling to and from sessions.⁶ They are also specifically shielded from questioning "in any other Place" for "any Speech or Debate in either House,"⁷ an immunity that is of particular significance to this report.

The Supreme Court in *Davis v. Passman* held that the scope of the separation of powers doctrine as a defense to prohibit judicial review of congressional employment practices violating constitutional rights is equal to but not greater than the protections provided to legislators by the speech or debate clause of the Constitution.⁸ Because the Supreme Court expressly declined to decide whether the speech or debate clause protected the employment decision challenged in *Davis*,⁹ it is necessary to trace the history and review judicial interpretations of the speech or debate clause to determine whether it shields congressional employment practices from review by the courts.

The Court in *Davis* was not, however, faced with a statutory scheme, such as Title VII, that specifically grants the judiciary and an administrative agency headed by Presidential appointees broad remedial powers to eliminate employment discrimination in the legislative branch. Presented with such a case, it is by no means clear that the Supreme Court would not reconsider its equation of the speech or debate clause with the separation of powers doctrine. Therefore, after examining whether the speech or debate clause prohibits external review of congressional personnel actions, this chapter will examine what factors the Supreme Court would likely consider in deciding whether a comprehensive,

statutory, equal employment opportunity scheme such as Title VII would "unduly disrupt" the constitutional functioning of the legislative branch.

Speech or Debate Clause

The speech or debate clause¹⁰ has been held by the Supreme Court to protect all "legitimate legislative activity."¹¹ Within this scope, it operates as an absolute bar to outside inquiry¹² and is designed to preserve the independence of the legislative process by providing for the independence of the individual legislators¹³ when performing legislative acts.¹⁴

Although several Supreme Court cases construing the speech or debate clause have recently been decided¹⁵ and the clause has been the subject of copious scholarly debate and criticism,¹⁶ the scope of the immunity conferred by the clause is still not clear, and it is only with the advent of the *Davis v. Passman* case that the question of its application to congressional employment practices has come to the forefront.¹⁷ Any discussion of this issue must be preceded by a brief discussion of the clause's history to define to the extent possible its perimeters as envisioned by the Framers because judicial interpretations of the clause rely heavily on its history.¹⁸

The speech or debate clause has its origins in the long struggle for supremacy between the Tudor and Stuart monarchs and the British Parliament. The British monarchs found that the civil or criminal arrest and imprisonment of hostile members of

⁶ U.S. Const. art. I, §6, cl. 1.

⁷ *Id.*

⁸ *Davis v. Passman*, 442 U.S. 228, 235-36 n.11 (1979).

⁹ *Id.*

¹⁰ U.S. Const. art. I, §6, cl. 1 provides: "[F]or any Speech or Debate in either House, they [Members] shall not be questioned in any other Place."

¹¹ *Doe v. McMillan*, 412 U.S. 306, 324 (1973).

¹² *Davis v. Passman*, 442 U.S. 228, 235 n.11 (1979).

¹³ *E.g.*, *Doe v. McMillan*, 412 U.S. 306, 324 (1973).

¹⁴ In *United States v. Helstoski*, 99 S. Ct. 2432 (1979), the Court acknowledged that in some instances the rights of individual Senators or Representatives may be different from the rights of their respective Houses for the purposes of the speech or debate clause, but the Court declined to decide whether passage of a criminal bribery statute was an exercise of Congress' power to regulate its Members in abrogation of their individual speech or debate clause privilege, or whether Congress, in fact, has constitutional authority as an institution to waive individual Members' privileges under the clause.

¹⁵ *Hutchinson v. Prosmire*, 99 S. Ct. 2675 (1979); *United States v. Helstoski*, 99 S. Ct. 2432 (1979); *Davis v. Passman*, 442 U.S. 228 (1979); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Doe v. McMillan*, 412 U.S. 306 (1973); *United States v. Brewster*, 408 U.S. 501 (1972); *Gravel v. United States*, 408 U.S. 606 (1972). Other Supreme Court decisions construing the speech or debate clause include *Powell v. McCormack*, 395 U.S. 486 (1969); *Dombrowski v. Eastland*, 387 U.S. 82

(1967) (per curiam); *United States v. Johnson*, 383 U.S. 169 (1966); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

¹⁶ *E.g.*, Bolton, Vanderstar, and Baldwin, *The Legislator's Shield: Speech or Debate Clause Protection Against State Interrogation*, 62 Marq. L. Rev. 351 (1979); Bradley, *The Speech or Debate Clause: Bastion of Congressional Independence or a Haven for Corruption*, 57 N.C. L. Rev. 197 (1979); Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Co-equality*, 8 Suffolk L. Rev. 1019 (1974); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present, and Future as a Bar to Criminal Prosecutions in the Courts*, 2 Suffolk L. Rev. 1 (1968); Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113 (1973); Suarez, *Congressional Immunity: A Criticism of Existing Distinctions and a Proposal for a New Definitional Approach*, 20 Vill. L. Rev. 97 (1974); Veder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 Colum. L. Rev. 131 (1910); Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning, and Scope*, 99 U. Pa. L. Rev. 960 (1951); Note, *Unenforced Congressional Subpoenas: Judicial Action and Congressional Immunity*, 59 Iowa L. Rev. 581 (1973-73); 9 Seton Hall L. Rev. 861 (1978); 41 Mo. L. Rev. 108 (1976); 46 Miss. L. J. 1112 (1975); 11 Duq. L. Rev. 677 (1973); 42 U. Cin. L. Rev. 780 (1973); 26 Vand. L. Rev. 327 (1973); 1970 Wis. L. Rev. 1216 (1970).

¹⁷ 442 U.S. 228 (1979).

¹⁸ See, e.g., *United States v. Johnson*, 383 U.S. 169, 177-83 (1966).

Parliament were effective means of silencing those who would enhance parliamentary authority.¹⁸ The struggle culminated in 1689 with the promulgation by a victorious Parliament¹⁹ of a bill of rights containing the following provision: "that the freedom of speech and debate, and proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."²⁰ The provision was incorporated almost verbatim in both the Articles of Confederation and in the U.S. Constitution without debate and with little discussion.²¹

English case law is not, however, particularly useful in construing the extent of the speech or debate privilege because the Supreme Court has ruled that the purpose of the privilege in the American constitutional structure is to provide for the independence of a coordinate branch of government rather than, as in England, to ensure the supremacy of Parliament.²²

Reflecting the checkered history of British parliamentary privileges, the Supreme Court of the United States has attempted to strike a balance between legislative independence and the preservation of individual rights.²³ "The fundamental purpose of the clause," noted the Court, "was to free 'the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator'."²⁴ This includes protection from private civil suits that, like actions instituted by the executive, "[create] a distraction and [force] Members to divert their time, energy and attention from their legislative tasks to defend the litigation."²⁵ But it is only their conduct as legislators,²⁶ their performance of "legislative acts," that is protected.²⁷

In its most recent exposition on the clause, the Supreme Court in *Hutchinson v. Proxmire* said:

¹⁸ *United States v. Johnson*, 383 U.S. 169, 178 (1966); Joint Comm. on Congressional Operations, *The Constitutional Immunity of Members of Congress*, S. Rep. No. 93-896, 93d Cong., 2d Sess. 5-6 (1974) (hereafter cited as "Constitutional Immunity"); Reinstein and Silverglate, *supra* note 15, at 1122-30.

¹⁹ Reinstein and Silverglate, *supra* note 15, at 1133.

²⁰ "Constitutional Immunity," *supra* note 18, at 6. See also Reinstein and Silverglate, *supra* note 15, at 1133.

²¹ Reinstein and Silverglate, *supra* note 15, at 1136.

²² *Hutchinson v. Proxmire*, 99 S. Ct. 2675, 2683-4 (1979), citing *United States v. Brewster*, 408 U.S. 501, 508 (1972). The *Brewster* court was also of the opinion that the American legislative experience "does not reflect a catalog of abuses at the hands of the Executive that gave rise to the privilege in England." *Id.* at 508.

²³ See, e.g., *Davis v. Passman*, 442 U.S. 228, 246 (1979).

²⁴ *United States v. Helstoski*, 99 S. Ct. 2432, 2441 (1979) (emphasis added), quoting *Gravel v. United States*, 408 U.S. 606, 618 (1972).

²⁵ *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975).

²⁶ *Doe v. McMillan*, 412 U.S. 306, 324 (1973).

The authors of our Constitution were well aware of both the need for the privilege and the abuses that could flow from [too] sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process.²⁸

The Supreme Court has struggled each time it has considered the issue of legislative immunity for speech or debate²⁹ to define that which "is necessary to preserve the integrity of the legislative process." It initially defined legislative activities broadly as including "things generally done in a session of the House by one of its members in relation to the business before it,"³⁰ but in 1972 the Court handed down its decision in *Gravel v. United States*³¹ that considerably narrowed the scope of the clause:

Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. . . . [T]he courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."³²

Thus, beyond literal speech or debate in the halls of Congress, the clause protects only "deliberative and communicative processes" that are an integral

²⁷ *Gravel v. United States*, 408 U.S. 606 (1972).

²⁸ 99 S. Ct. 2675, 2684 (1979) (emphasis in the original), quoting *United States v. Brewster*, 408 U.S. 501, 517 (1972).

²⁹ See note 14, *supra*.

³⁰ *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880). The scope of the clause has also been described as encompassing conduct within the "sphere of legitimate legislative activity." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975).

³¹ 408 U.S. 606 (1972).

³² *Id.* at 625, quoting *United States v. Doe*, 455 F.2d 753, 760 (1st Cir. 1972). This definition has since been quoted with approval by the Court in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975), and in *Hutchinson v. Proxmire*, 99 S. Ct. 2675, 2684 (1979). In *Gravel* the Supreme Court held that the speech or debate clause did not immunize either Senator or aide if they violated a criminal statute in preparing for or in implementing a protected legislative act. 408 U.S. at 621. On the other hand, the Court determined that the immunity of congressional aides is coextensive with that of their congressional employers. *Id.* at 622.

part of either "consideration and passage or rejection of proposed legislation," or "other matters which the Constitution places within the jurisdiction of either House."³³ This is a fairly restrictive definition of legislative activities. As the Court reiterated in its most recent pronouncement on the subject, its prior decisions:

had carefully distinguished between what is only "related to the due functioning of the legislative process," and what constitutes the legislative process entitled to immunity under the Clause: [O]nly "acts generally done in the course of the process of enacting legislation were protected. . . . In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process."³⁴

Protected activities include speeches on the floor of Congress, votes,³⁵ compiling and voting for publication of committee reports circulated within Congress,³⁶ conduct in committee investigations and proceedings,³⁷ and the issuance of subpoenas in the aid of lawful committee investigations.³⁸ Many of the activities that the Court has determined *not* to be shielded by the speech or debate clause are otherwise indisputably legitimate activities of the typical Member. For example, press releases,³⁹ constituent newsletters,⁴⁰ and telephone calls to Federal agencies by which Members seek to influence the conduct of those agencies⁴¹ are not protected.

³³ Suarez, *supra* note 15, at 118 n.161. The Court has also made a distinction between "legislative" acts and "political" acts. In a case handed down on the same day as its decision in *Gravel*, the Court in *United States v. Brewster*, 408 U.S. 501 (1972), explained the dichotomy:

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. . . . They are performed in part because they have come to be expected by constituents, and in part because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases.

Id. at 512. This distinction between "political" and "legislative" activities has been criticized by some commentators. See, for example, Suarez, *supra* note 15, at 126-31. But the Court quoted this language with approval when it held that issuance of defamatory congressional press releases and newsletters were not legislative acts shielded by the clause. *Hutchinson v. Proxmire*, 99 S. Ct. 2675, 2686-87 (1979).

³⁴ *Hutchinson v. Proxmire*, 99 S. Ct. at 2686, quoting *United States v. Brewster*, 408 U.S. 501, 513-515 (1972). While this language refers to other than housekeeping functions of Congress, the same restrictive principle (that relationship to the legislative process alone is not enough) will apply to internal operational functions.

³⁵ *United States v. Helstoski*, 99 S. Ct. 2432, 2439 (1979). See also *United States v. Johnson*, 383 U.S. 169 (1966). The Supreme Court has also held that the speech or debate clause does not protect Members of Congress who accept a bribe in violation of 18 U.S.C. §201 (1976) where such

Furthermore, while committee chairmen are protected when they acquire information for an investigatory hearing by subpoena,⁴² they may be questioned if they acquire information informally from third parties.⁴³ Members or their aides are also subject to suit or questioning where they arrange for private publication of congressional committee records,⁴⁴ and public officials may be liable if they distribute to persons not in Congress committee reports printed by the government that are already a matter of public record.⁴⁵

These decisions of the Supreme Court have quite obviously limited the definition of "legislative acts." Moreover, even when conduct falls within this narrow definition of legislative activities, judicial review is not precluded if the implementation or execution of the otherwise immune legislative act is carried out by a nonimmune congressional employee. The clause literally forbids the questioning of only Senators or Representatives as to legislative acts. Thus, resolutions of the House finding a private citizen in contempt,⁴⁶ or excluding a Member-elect from his seat,⁴⁷ or a committee vote to refer a report containing libelous material to be printed and distributed to the public,⁴⁸ or a staff member's decision to seize subpoenaed documents⁴⁹ have all been held to be reviewable by the courts if executed or implemented by someone not entitled to immunity under the speech or debate clause.⁵⁰ A "pure" speech or

conduct represents a promise by a Member to perform an act in the future. Prosecution may be had so long as reference is not made to a legislative act or the motivation for a legislative act, such as voting. *United States v. Helstoski*, 99 S. Ct. 2432, 2439-40 (1979); *United States v. Brewster*, 408 U.S. 501, 512 (1972); *United States v. Johnson*, 383 U.S. 169, 184 (1966).

⁴² *Doe v. McMillan*, 412 U.S. 306 (1973).

⁴³ *Id.*; *Kilbourn v. Thompson*, 103 U.S. 168 (1880). See also *Ray v. Proxmire*, 581 F.2d 998 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 933 (1978).

⁴⁴ *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Dombrowski v. Eastland*, 387 U.S. 81 (1967) (*per curiam*); cf. *Tenney v. Brandhove*, 341 U.S. 367 (1951) (investigational subpoenas issued by a State legislative committee protected by speech or debate clause).

⁴⁵ *Hutchinson v. Proxmire*, 99 S. Ct. 2675, 2687 (1979).

⁴⁶ *Id.*

⁴⁷ *Id.* at 2681 n.10, citing *United States v. Johnson*, 383 U.S. 169, 172 (1966); *United States v. Brewster*, 408 U.S. 501, 512 (1972).

⁴⁸ *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

⁴⁹ *Gravel v. United States*, 408 U.S. 606 (1972).

⁵⁰ *Id.*

⁵¹ *Doe v. McMillan*, 412 U.S. 306 (1973).

⁵² *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

⁵³ *Powell v. McCormack*, 395 U.S. 486 (1969).

⁵⁴ *Doe v. McMillan*, 412 U.S. 306 (1973).

⁵⁵ *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (*per curiam*). But cf. *McSurely v. McClellan*, 553 F.2d 1277, 1288 n.36 (D.C. Cir. 1976), *cert. denied*, 438 U.S. 109 (1978) (suggesting that availability of immunity depends on the nature of the act involved rather than on the status of the actor).

⁵⁶ The Supreme Court has never explained when or under what circumstances legislative branch employees will be accorded speech or debate

debate clause case naming only Members of Congress and immune congressional employees as defendants may completely bar all judicial review of protected legislative activity⁵¹ unless judicial review occurs in the context of an appeal from a conviction for contempt of Congress⁵² or by an action for declaratory judgment against the U.S. attorney or the Attorney General if they must act to execute a congressional resolution.⁵³

Thus, the first prong of the *Gravel* test for protected "legislative activities" amounts to a prohibition against requiring Members of Congress to defend their individual conduct when they are acting as legislators in the usual processing of bills: consideration of bills in committee hearings, the writing and distribution to other Members of committee reports, debates in committee and on the floor of Congress, and voting.

Congressional regulation of its own personnel practices⁵⁴ would fall within the second prong of the *Gravel* test as "other matters which the Constitution places within the jurisdiction of either House."⁵⁵

To date, the Supreme Court has not specifically applied the *Gravel* test to a case involving the authority of Congress to regulate the conduct of its Members. But the Court has construed the clause narrowly in favor of allowing Federal prosecution of Members for bribery⁵⁶ and in allowing judicial review of the congressional exclusion of Representative Adam Clayton Powell. *Powell v. McCormack*⁵⁷ involved a claim of congressional privilege to exclude a Member-elect under Congress' power to

judge the qualifications of its Members or to punish them by expulsion free from judicial review.

Representative-elect Adam Clayton Powell (and voters from his congressional district) sued the Speaker of the House, five Members, the Clerk of the House, the Sergeant-at-Arms, and the Doorkeeper for a declaratory judgment that a House resolution excluding him from his seat was unconstitutional.

Brushing aside the difficult separation of powers question,⁵⁸ the Supreme Court concluded that the Members themselves were immune from suit by reason of the speech or debate clause, but that judicial review was not precluded because of the presence of the defendant congressional employees. The Court reasoned that the "purpose of the protection afforded the legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions."⁵⁹ Therefore, judicial review may be had as long as the burden of defending the congressional action is borne by nonimmune congressional employees.⁶⁰

The decision in *Powell* is consistent with earlier and later decisions of the Court in favor of judicial review of legislative action⁶¹ even when the Constitution grants the legislative branch exclusive authority to judge the qualifications of its Members or expel them.⁶² Nor does the power of Congress to punish its Members for disorderly behavior automatically shield from prosecution all acts done by a Member.⁶³ For criminal acts beyond the scope of the

clause immunity. See Suarez, *supra* note 15, at 123-26. On the other hand, its decision in *Gravel* indicates that top aides, as "alter egos" to Members, may have immunity for their legislative acts. See note 32, *supra*.

⁵¹ Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); 46 Miss. L. J. 1112, 1112-18 (1975).

⁵² *Id.* at 1120.

⁵³ *Id.* at 1121-22.

⁵⁴ This has been accomplished by both rule and statute. See chapter 1, *supra*.

⁵⁵ Baker v. Carr, 369 U.S. 186, 217 (1962) (defining "political question" cases in the context of the separation of powers doctrine). See also text accompanying note 33, *supra*.

⁵⁶ See text accompanying note 35, *supra*.

⁵⁷ 395 U.S. 486 (1969). *Gravel* was decided 3 years later.

⁵⁸ *Powell* holds that the question is whether the issue is barred from judicial review because of the political question doctrine. It concludes that the powers committed to the legislative branch to judge the qualifications of its Members and expel a Member upon a two-thirds vote are limited by the explicit terms of the Constitution. *Id.* at 548. In art. I, §2, the Constitution sets forth the standing qualifications for Members of Congress; they are the only yardstick either House may use in judging its Members' qualifications. Similarly, the Court concluded that the Constitution granted to Congress only the power to expel, not exclude. *Id.* Actions taken in contravention of these constitutional prescriptions are not actions committed to the legislative branch exclusively. The Supreme Court has the power to construe and

delineate claims of express and inherent constitutional authority asserted by the other branches of the Federal Government. *United States v. Nixon*, 418 U.S. 683, 703-05 (1974); *Davis v. Passan*, 442 U.S. 228, 235 n.11 (1979).

⁵⁹ *Powell v. McCormack*, 395 U.S. 486, 505 (1969).

⁶⁰ See text accompanying notes 46-51, *supra*.

⁶¹ See text accompanying notes 39-45, *supra*.

⁶² *Cf. Roudebush v. Hartke*, 405 U.S. 15 (1972) (art. I, §5 of the U.S. Constitution does not preclude a State from ordering a recount of the votes cast in an election to select a U.S. Senator).

⁶³ E.g., *United States v. Helstoski*, 99 S. Ct. 2432 (1979) (prosecution for bribery); *United States v. Brewster*, 408 U.S. 501 (1972) (prosecution for bribery); *Williamson v. United States*, 207 U.S. 425 (1907) (prosecution for subornation of perjury).

If it could be shown that concurrent Federal prosecution of the criminal misconduct of a Member of Congress would impair or interfere with concurrent congressional proceedings against the Member, it is arguable that the separation of powers doctrine would bar such prosecution. *Cf. Roudebush v. Hartke*, 405 U.S. 15 (1972), in which a successful senatorial candidate sought to enjoin a State recount commission from proceeding with the recount of votes in a senatorial election on the grounds that the U.S. Constitution, art. I, §5, made the U.S. Senate the sole judge of the elections and qualifications of its Members. The Supreme Court held, however, that the State recount was a valid exercise of its powers to set the times, places, and manner of elections pursuant to art. I, §4, of the

speech or debate clause, Congress' power to discipline its Members is merely concurrent with that of the courts, not exclusive. The speech or debate clause only bars prosecution of Members for criminal conduct⁶⁴ that falls within the definition of a legislative act or the motivation for a legislative act.⁶⁵

The only published decision⁶⁶ of a Federal court construing the applicability of the speech or debate clause to congressional employment practices, however,⁶⁷ is the panel decision of the U.S. Court of Appeals for the Fifth Circuit in *Davis v. Passman*.⁶⁸ The panel, in holding that the allegations in Davis' complaint stated a right to sue for damages for unconstitutional sex discrimination, concluded that the speech or debate clause would not protect Representative Passman from liability if Davis proved the truth of her allegations.⁶⁹ The court, reasoning that staff dismissals were not integral to the legislative process but at best merely tangential,⁷⁰ stated:

The business of Congress is to legislate; Congressmen and [aides] are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity," they enjoy no special immunity. . . .⁷¹

The court concluded that staff dismissals were too remote from the core of legislating, which was

Constitution because it did not usurp the Senate's power or impair its ability to make a final and independent judgment as to which candidate would be seated. See discussion of *Burton v. United States*, *infra*.

⁶⁴ Neither criminal nor unconstitutional conduct is per se beyond speech or debate clause protection. In *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), the Court stated: "Congressmen and their aides are immune from liability for their actions within the 'legislative sphere,' even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Id.* at 510, quoting *Doe v. McMillan*, 412 U.S. at 312-13 (citation omitted). See also *Kaye, Congressional Papers, Judicial Subpoenas, & the Constitution*, 24 U.C.L.A. L. Rev. 523, 567 n.191 (1977); 25 U.C.L.A. L. Rev. 796, 809 n.78, 810 nn. 79, 81 (1978).

⁶⁵ The motivation or purpose for an act may, of course, be inquired into where nonlegislative acts are involved. *E.g.* *Hoellen v. Annunzio*, 468 F.2d 522, 526-27 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973). The case involved a suit by a candidate against an incumbent Congressman alleging misuse of the franking privilege accorded Members by 39 U.S.C. §3210-16 (1976). The court of appeals, then Judge Stevens, permitted examination of the disputed mailing and its circumstances in order to determine whether the mailing fell within the act's definition of "official business." Purpose or intent is also relevant in construing legislation, *United States v. Lovett*, 328 U.S. 303 (1946), or congressional rules, *United States v. Smith*, 286 U.S. 6 (1932). It follows that so long as a Member of Congress is not required to explain his or her individual vote, judicial review of the effect of collective individual legislative acts such as committee votes or a resolution or statute may include an inquiry into the intent or purpose of the action through the examination of congressional debates, committee reports, and the like. See 286 U.S. 6.

⁶⁶ A former employee of Representative Shirley Chisholm has a civil

"legislative policy-formulation." Although it conceded that the fear of burdensome though ultimately unfounded litigation might deter some Members from dismissing high-ranking aides, thus affecting the Members' "deliberative role," the court added that its provision for a qualified good faith immunity and the availability of summary judgment procedures would result in a "very low likelihood of recovery," leaving Members liable for only the most "egregious" employment practices and thereby rendering the impact on the legislative process "extremely remote."⁷² Nor was the court persuaded that subjecting Members of Congress to suit for unconstitutional employment practices per se violated the purpose of the speech or debate clause, one of the purposes of which is to protect Members from "vexatious litigation."⁷³

However, Judge Oliver Gasch's unpublished Memorandum Order in *Parker v. Allen*⁷⁴ demonstrates that the speech or debate clause has serious implications for other congressional employees who are not employed on the personal staffs of Members of Congress. Both House and Senate rules provide for the hiring of committee staff to be accomplished by committee vote. In addition, committees having oversight of legislative branch units providing certain administrative services to the Congress may have authority to order dismissal or approve the hiring of unit employees. The speech or debate clause limits congressional liability for unconstitu-

action pending alleging unconstitutional employment discrimination on the basis of sex. *Lewis v. Chisholm*, No. 78-0196 (D.D.C., filed Feb. 3, 1978). In addition, the question has reportedly been raised in the House by Representative Charles H. Wilson in seeking to bar judicial enforcement of a grand jury subpoena for his personnel records. See *Washington Post*, Feb. 9, 1980, sec. A, at 1, col. 1.

⁶⁷ In *Estlinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973), a female law student sued members of the South Carolina Senate for delaying her temporary assignment as a page on the basis of her sex pursuant to a Senate resolution. The court of appeals affirmed the district court's dismissal of the case against the legislators because of their immunity under the speech or debate clause, but held the policy violative of the equal protection clause of the 14th amendment and enjoined the Clerk of the Senate from enforcing it in the future.

⁶⁸ 544 F.2d 865 (5th Cir. 1977), *rev'd on rehearing on other grounds*, 571 F.2d 793 (5th Cir. 1978) (*en banc*), *rev'd*, 442 U.S. 228 (1979). The Supreme Court refused to decide whether the speech or debate clause would bar a suit for damages based on the allegations of unconstitutional employment discrimination against an individual Member of Congress. 442 U.S. at 235 n.11. For a discussion of the facts of the case, see chapter 1 of this report.

⁶⁹ 544 F.2d at 881-82.

⁷⁰ *Id.* at 880.

⁷¹ *Id.*, quoting *Doe v. McMillan*, 412 U.S. 306, 324 (1973) (citation omitted).

⁷² *Id.* at 880 n.25.

⁷³ A promise by a Member to vote or to introduce particular legislation in exchange for a bribe, however, has been held not to be protected legislative activity within the speech or debate clause.

⁷⁴ No. 74-1846 (D.D.C. June 16, 1975).

tional employment discrimination decisions taken by committee vote. The Supreme Court has always protected individual legislators from having to account for the way they voted even where the Court has found the resolution or other legislative action to be unconstitutional or otherwise actionable.⁷⁵ It follows that an employee affected by committee vote would have little, if any, chance for success in an action against the individual committee Members and immune committee staff.⁷⁶

However, judicial review of committee employment decisions is available when the decision is implemented or executed by nonimmune congressional employees⁷⁷ or by individual Members themselves.⁷⁸

Judicial review was predicated on this rationale in *Parker v. Allen*.⁷⁹ Parker was headwaiter of the Senate Restaurant when he was fired by the Architect of the Capitol on September 19, 1974, pursuant to the unanimous vote of the Subcommittee on the Restaurant of the Senate Committee on Rules and Administration.⁸⁰ Parker filed suit in the U.S. District Court for the District of Columbia against nine Senators,⁸¹ the Architect of the Capitol, and the United States, alleging that his dismissal violated his fifth amendment right to procedural due process and breached certain alleged contract rights.⁸²

All defendants moved to dismiss the complaint or, in the alternative, for summary judgment on several grounds, one of which being that Parker's suit was barred by the speech or debate clause.⁸³ Judge

Gasch, in dismissing the suit against the Senators, remarked:

The Restaurant is obviously considered a part of the internal "housekeeping" facilities of the Senate. The Court regards it as obvious that the Senate has inherent power, under the Constitution, to make internal arrangements for its own necessities. The Restaurant clearly serves such a need. Administration of the Restaurant, while it may not attain to the magnitude of some Congressional duties, is clearly an activity which is within "the legislative sphere." Plaintiff here can point to nothing done by the defendant Senators except a determination of this matter by vote in a Senate subcommittee. It follows that the sole basis for plaintiff's complaint against the defendant Senators are activities which are privileged under the Speech or Debate Clause.⁸⁴

The execution of the committee vote, the actual dismissal of Parker by the Architect of the Capitol, was not considered by the court to have been protected legislative activity⁸⁵ even though the decision was arrived at and rendered through protected legislative acts. Parker's firing, therefore, was held to be judicially reviewable because the Architect of the Capitol was not accorded legislative immunity.⁸⁶

It is the character and nature of the personnel action itself that must be integral to the "deliberative and communicative process." Arguably, the accep-

tive activity." On the other hand, the court notes that it is a "legislative activity" because of the subcommittee deliberation and vote. The former argument is not consistent with precedent. The speech or debate clause protects even those legislators whose committee deliberations lack a valid legislative purpose. See *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970).

⁷⁵ *Id.* at 7. The inherent constitutional power to which the Court referred is Congress' rulemaking authority pursuant to U.S. Const. art. I, §5, cl. 1. *Id.* at 9 n.19.

⁷⁶ *Id.* at 9. The Court cited *Eastland v. United States Servicemen's Fund*, 425 U.S. 491 (1975); *Gravel v. United States*, 408 U.S. 606 (1972); *Powell v. McCormack*, 395 U.S. 386 (1969); *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

⁷⁷ Parker's motion for partial summary judgment was granted as to his claim of denial of procedural due process. The Architect of the Capitol was ordered to provide him the detailed list of charges against him for which he might be terminated and was further ordered to afford Parker an opportunity for a hearing before an impartial examiner empowered to subpoena witnesses. Parker was to be accorded the right to subpoena witnesses, to confront and cross examine hostile witnesses, to be represented by counsel, and "such other rights as are consistent with traditional notions of due process." The examiner was to render a written decision based upon the evidence before him, stating the reasons for the conclusions reached. Slip op. at 19. The Architect of the Capitol ultimately dismissed the charges against Parker and paid him \$15,000 on the condition that he waive his right to a hearing and not seek his old job. 36 Cong. Q. 340, 341 (1978).

⁷⁸ *E.g.*, "Constitutional Immunity," *supra* note 18, at 23-30; *Suarez*, *supra* note 15, at 137.

⁷⁵ *E.g.*, *Doe v. McMillan*, 412 U.S. 306 (1973); *Powell v. McCormack*, 395 U.S. 496 (1969); *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

⁷⁶ *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Doe v. McMillan*, 412 U.S. 306 (1973); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (per curiam); *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

⁷⁷ In *Gravel v. United States*, 408 U.S. 606 (1972), Mr. Justice White, writing for the Court, noted: "[N]o prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances." *Id.* at 621. The Court in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 507-08 (1975), quoted this passage, noting that these acts were not essential to legislating and therefore not protected by the speech or debate clause. *But see* 421 U.S. 491, 517 (Marshall, J., concurring).

⁷⁸ See text accompanying note 69, *supra*.

⁷⁹ No. 74-846, slip op. at 5 (D.D.C. June 16, 1975). The Committee acted pursuant to its authority under 40 U.S.C. §174 (1970).

⁸⁰ Senators James Allen, Marlow Cook, and Harrison Williams were members of the Subcommittee on the Restaurant and with Senators Howard Cannon, Claiborne Pell, Hugh Scott, Robert Byrd, Robert Griffin, and Mark Hatfield were at the time members of the Senate Committee on Rules and Administration. *Id.* at 1 n.2.

⁸¹ *Id.* at 7.

⁸² *Id.* at 12. The court's reasoning concerning the speech or debate clause is subject to a number of interpretations. On the one hand, the court implies that the subject matter of the committee's action—the provision of administrative services to Congress—renders the committee vote a "legisla-

tance of a monetary bribe for the performance of an official act such as voting is much closer to the legislative core than is the hiring or firing of even personal staff, yet the Supreme Court has consistently held that the speech or debate clause does not bar such bribery prosecutions.

Further, Court decisions restricting the scope of the speech or debate clause to allow the executive or judicial branches to question the flow of information to and from Congress are potentially much more inimical to the "deliberative and communicative" process than questioning personnel decisions made by individual Members or by congressional committees.

While acknowledging the crucial role played by information in the legislative process and the importance and desirability of the informational function, the Supreme Court has not found these rationales sufficient to accord all information-gathering and dissemination activities of the legislative branch immunity from judicial or executive review. Similarly, the acknowledgment by the Supreme Court in *Gravel* of the important role played by staff in assisting the Member in the performance of his or her duties does not make the personnel function itself integral to the legislative process. In summary, Supreme Court precedent establishes that individual personnel decisions are not protected by the speech or debate clause unless made in committee by the vote of committee Members, and even these protected legislative acts are subject to judicial review by an action against those legislative employees implementing the committee decision.

Many commentators have criticized the Supreme Court's narrow construction of the speech or debate clause as fundamentally misunderstanding the role of Congress in our constitutional system. Others have suggested that the Court understands the various functions of the Congress but has concluded that the extraordinary immunity of the speech or debate clause applies only when Congress is legislating in the narrowest sense of the term.⁶⁷ Critics of the Court's narrow definition of protected legislative activities point out that such legitimate activities as performing errands for constituents, conferring with government agencies, assisting in securing government contracts, preparing newsletters to constitu-

ents, and writing news releases and speeches to be delivered outside Congress are not protected by the speech or debate clause because they are considered "political" or "external" in nature.⁶⁸ Even to expand the scope of the clause's applicability to include these informational functions of Congress, however, would not shield unconstitutional employment practices from judicial scrutiny because such practices are not necessary to fulfill Congress' responsibility to inform the public of its legislative activities.

The Undue Disruption Standard

The conclusion that the speech or debate clause does not shield individual congressional employment decisions from judicial or executive review may not be dispositive of the institutional separation of powers concerns of the legislative branch.

While *Davis v. Passman* held that the speech or debate clause is coextensive with the doctrine of separation of powers, it involved only a cause of action for damages against an individual Member. It did not consider equitable remedies, such as reinstatement or other forms of affirmative relief, or call for the involvement of the executive branch in vindicating congressional employees' rights.⁶⁹

A statutory scheme, by rearranging institutional relationships between the coordinate branches, could present separation of powers concerns that are not at issue when claims of unconstitutional activity are made against individual Members of Congress. Moreover, to the extent any such statutory scheme provided for equitable relief, it could present additional separation of powers concerns. Therefore, the equation of the protections of the speech or debate clause and the separation of powers doctrine that *Davis v. Passman* held to be present in the context of individual constitutional litigation may not necessarily be applicable to a broader statutory restructuring of authority among the three branches. The "undue disruption" standard addresses these institutional separation of powers concerns and provides the analytic framework for determining compliance with constitutional requirements. A statutory scheme permitting judicial and executive involvement with legislative branch personnel policies would not violate the Constitution so long as it did

⁶⁷ *Swartz*, *supra* note 15, at 110-23; *Reinstein and Silverglate*, *supra* note 15, at 1149-72. See also note 33, *supra*.

⁶⁸ See 46 Geo. Wash. L. Rev. 137, 151 n.123 (1977).

⁶⁹ Federal courts have been very reluctant to issue equitable decrees against the Congress, usually under the rationale that the separation of

powers doctrine precludes such exercise of judicial power. *Yellin v. United States*, 374 U.S. 109, 121 (1963) (citing *Pauling v. Eastland*, 288 F.2d 126 (D.C. Cir.), *cert. denied*, 364 U.S. 900 (1960)). Cf. *Powell v. McCormack*, 395 U.S. 486, 517 (1969). However, in some of these cases did the Court have before it an explicit congressional command to apply equity.

not "unduly disrupt" the constitutional functioning of the legislative branch.

The most recent and leading case on undue disruption generally is *Nixon v. Administrator of General Services*,⁹⁰ which establishes the following standard:

[I]n determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the [affected] [b]ranch from accomplishing its constitutionally assigned functions. . . . Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.⁹¹

This standard requires two distinct determinations: the nature and extent of the potential disruption of constitutional functions and whether that degree of potential disruption is outweighed by the achievement of important public policy objectives within Congress' legislative authority.

The essential difference between this institutional separation of powers question and the immunity afforded individual Members under the speech or debate clause is that the question is not readily susceptible to a yes or no answer. What is or is not a "legitimate legislative activity" has been defined by the courts. But because the three branches are not "airtight compartments," some interaction, even some interference, was intended by the Framers:

In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.⁹²

This mutual dependence is evident from the complex weaving of governmental authority embodied in the Constitution. No branch of govern-

ment may exercise its governmental power without the concurrence of at least one other independent branch. This system of "checks and balances" operates to keep any single branch from dominating the others or acquiring excessive power and thereby provides a measure of political stability. Unlike the English system of parliamentary government in which the legislature is preeminent,⁹³ the American Constitution creates three coequal, coordinate, and mutually dependent bodies. Thus, legislation must pass through a bicameral legislature and obtain Presidential approval to be enacted as law, but if the President vetoes such legislation Congress can override that veto if two-thirds of its Members so decide.⁹⁴ While the President is charged with the responsibility of executing and administering the laws⁹⁵ and negotiating treaties with foreign nations,⁹⁶ the public officers whom he appoints and the treaties he negotiates with other countries must be approved by the Senate.⁹⁷ All laws enforceable by the courts are subject to judicial review,⁹⁸ but the judicial branch must rely on the executive branch for the enforcement of its orders,⁹⁹ and its jurisdiction to hear cases is in part controlled by Congress.¹⁰⁰ It is this complex interaction between separate but mutually dependent branches, based on the two guiding principles of separation of powers and checks and balances, that is the hallmark of the American system of government.

As a result, preserving the essential independent core of the legislative branch of the government from overly disruptive interference by the other branches requires an analysis which recognizes that the issue is one of degree. Seeking the assistance of the other branches to achieve legitimate objectives within the constitutional jurisdiction of the Congress does not, in and of itself, do violence to the concept of the separation of powers. As the Court recently reiterated, the fact that there is a separation of powers:

negotiate treaties that must gain Senate approval in order to take effect. Many of these agreements rest solely upon the President's constitutional prominence in foreign affairs and his authority as Commander-in-Chief. The Constitution of the United States of America—Analysis and Interpretation, S. Doc. No. 92-82, 92d Cong., 2d Sess. 505-07 (1973). Similarly, Congress has increasingly asserted a power of legislative veto over certain executive branch actions, an authority that President Carter has contested as unconstitutional. H. R. Doc. No. 95-357, 95th Cong., 2d Sess. (1978), 124 Cong. Rec. H5879 (daily ed. June 21, 1978).

⁹⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁹¹ *Gibson, The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 Seton Hall L. Rev. 435, 436 (1974).

⁹² U.S. Const. art. III, §2.

⁹⁰ 433 U.S. 425 (1977).

⁹¹ *Id.* at 443.

⁹² *United States v. Nixon*, 418 U.S. 683, 707 (1974).

⁹³ See *United States v. Brewster*, 408 U.S. 501, 506 (1972).

⁹⁴ U.S. Const. art. I, §7. A bill also becomes law if it is not returned to Congress by the President in 10 days (Sundays excluded) unless Congress, by adjournment, prevents its return, resulting in a "pocket veto." *Id.*

⁹⁵ *Id.* art. II, §3.

⁹⁶ *Id.* §2; *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936).

⁹⁷ U.S. Const. art. II, §2, cl. 2. Constitutional limitations on the powers of the President and the Congress are not always clear. Limits are often established by the political dynamics of the day. In the area of foreign relations, modern Presidents have chosen with increasing frequency to enter into executive agreements with other countries rather than to

is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.¹⁰¹

Comprehensive separation of powers analysis to determine whether extending Title VII to Congress goes beyond the "common sense" bounds of that doctrine is not possible primarily because of the vast range of options Congress has in choosing the extent to which it wishes to enlist the aid of other branches. Congress might provide for administrative enforcement by vesting an appropriate administrative agency with any combination of factfinding, rulemaking, or remedial powers. Congress might alternatively wish to provide for limited judicial review of such agency action or might give the courts authority to hear claims independently of any administrative determination, allowing the courts to use all or a portion of their remedial powers. These few examples demonstrate the wide variety of enforcement schemes available to Congress. In addition, a complete constitutional analysis of the validity of any statutory scheme must await its application in a particular factual context. At this time, therefore, only an examination of facial validity is possible.¹⁰²

The Court in *Nixon* considered several factors in deciding whether an act of Congress unduly encroached upon prerogatives of the executive branch.¹⁰³ The first and most important factor as far as congressional employment issues are concerned is whether the affected branch consented to the potential disruption. Consent is relevant on the assumption

that no branch of the national government would agree to permit another branch to hobble its constitutional powers. Consent by the affected branch thereby implies that that branch has analyzed its constitutional functions and found that they will be unimpaired by the particular interaction with a coordinate branch at issue. It is in this context that the Court said, "each branch of the government has the duty initially to interpret the Constitution for itself, and . . . its interpretation of its powers is due great respect from the other branches. . . ."¹⁰⁴ In amending Title VII to include coverage for legislative branch employees, Congress would itself be designing the statute to meet its institutional objectives and constitutional prerogatives rather than merely consenting to a set of rules imposed upon it by another branch of the government.

Therefore, given a clear legislative history setting forth the need for congressional action, and establishing the clear intent of Congress to apply specific remedies with the aid of the other two branches, that congressional determination would probably be all but conclusive on the separation of powers issue.

More than the usual deference to a coordinate branch would be involved in such a situation. Undue disruption is primarily a factual question. The Congress is in the best position to answer the factual question as to whether Title VII coverage would impair its legislative policy formulation or other constitutional functions.¹⁰⁵ Secondly, the constitutional grant of authority to regulate its own internal affairs certainly includes within its scope the power to prohibit discriminatory personnel practices. Congress might well determine that effective internal enforcement of those proscriptions is not feasible and that it is necessary to involve the other branches

against release. Rather than purporting to abrogate executive privilege, the act incorporated it. In light of the experience under the Freedom of Information Act and other statutes regulating executive branch documents, and considering the important public policies the act promoted, the Court concluded that the act, on its face, did not violate the separation of powers doctrine.

¹⁰¹ *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 442-43 (1977).

¹⁰² Congress can minimize any potential for unwanted disruptive interference by the other branches in its internal affairs by a variety of means. It is Congress' prerogative to set the standards for liability and the limits on external remedial authority. Congress can maintain a significant measure of control over any administrative agency in the legislative branch implementing statutory rules of congressional conduct. See chapter 4, *infra*. As to judicial enforcement, the role of interpreting and enforcing the law is the very role the courts are intended to play in our constitutional scheme. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Of course, if the implementation of an antidiscrimination law proves unduly disruptive to the functioning of Congress, Congress may amend or repeal it.

¹⁰¹ *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (quoting *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928)).

¹⁰² See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 438-39 (1977).

¹⁰³ Former President Nixon challenged the constitutionality of Title I of the Presidential Recording and Materials Preservation Act, Pub. L. No. 93-526, §§101-106, 88 Stat. 1695 (codified at 44 U.S.C. §2107 note (1974)), alleging, among other claims, that the act violated the separation of powers doctrine because the act regulated the custody and screening of presidential documents.

The Court rejected the separation of powers argument, noting that the executive branch had consented to the act's provisions when President Ford signed it and the Solicitor General of the Carter administration supported its constitutionality in court. The materials were committed to the custody of a presidential appointee empowered to promulgate implementing regulations and under whose supervision executive branch employees would screen the materials. The act also expressly provided for limited disclosure of the materials to other branches and the public subject to the assertion of any constitutionally based privileges or legal defense

if its policy of equal employment opportunity is to be implemented.¹⁰⁰

The Supreme Court reached essentially the same conclusion in upholding the constitutionality of the predecessor to the current conflict of interest provision in the Federal criminal code, 18 U.S.C. §201 (1976). *Burton v. United States*¹⁰¹ affirmed the conviction of a United States Senator for accepting money in return for efforts to influence the Post Office Department in a mail fraud investigation. The Court rejected the Senator's separation of powers argument with language that, though not conclusive for the present question, is nonetheless of value:

It is said that the statute interferes, or, by its necessary operation, will interfere, with the legitimate authority of the Senate over its members. . . . In our judgment there is no necessary connection between the conviction of a Senator of a public offense prescribed by statute and the authority of the Senate in the particulars named. While the framers of the Constitution intended that each Department should keep within its appointed sphere of public action, it was never contemplated that the authority of the Senate to admit to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it. In order to promote the efficiency of the public service and enforce integrity in the conduct of such public affairs as are committed to the several Departments, Congress, having a choice of means, may prescribe such regulations to those ends as its wisdom may suggest, if they be not forbidden by the fundamental law.¹⁰²

It seems only logical that a branch of government seeking aid in regulating its own affairs should be given the widest latitude in its choice of regulatory

schemes. Indeed, three of the four dissenting Justices in *Davis v. Passman* indicated that their separation of powers objections to judicial intrusion upon congressional employment practices would evaporate if Congress statutorily authorized judicial review of congressional employment practices.¹⁰³

Just as Congress is the best judge of the potential for disruption to its own functioning, it is also the best judge as to the balance that the *Nixon* decision suggests can be struck between some disruption on the one hand and achievement of an important public purpose on the other. The degree of disruption which is constitutionally tolerable is "augmented by the important interests that the Act seeks to obtain."¹⁰⁴

Employment discrimination is clearly a matter of great public importance that Congress can address through legislation.¹⁰⁵ The importance of the public policy in favor of equal employment opportunity is not diminished by applying the principle to the employment practices of the national legislature. Some proponents of applying antidiscrimination law to Congress argue that such action will promote public respect for Congress by demonstrating its willingness to live under the laws it applies to the rest of the Nation.¹⁰⁶ Arguably, this would enhance rather than detract from Congress' Article I functioning.

Whether Congress' constitutional functioning is enhanced or disrupted is for Congress to determine initially by choosing or refusing to enact equal employment opportunity legislation applicable to its own employees. "Only when the potential for disruption is present," said the Court in *Nixon*, "must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."¹⁰⁷ It seems highly unlikely that the Supreme Court would strike down, as repugnant to the separation of powers doctrine, a carefully and

¹⁰⁰ See text accompanying notes 29-37 in chapter 4, discussing the appointments clause.

¹⁰¹ 202 U.S. 344 (1906).

¹⁰² *Id.* at 366-67. In particular, the Court concluded that criminal conviction of the Senator in no way impaired the power of the Senate to independently punish or expel him. *Id.* at 367. Similarly, the ability of Congress to independently punish or expel Members found by a court or agency to have violated equal employment opportunity legislation would not be impaired.

¹⁰³ *Davis v. Passman*, 442 U.S. at 249 (Burger, C.J., dissenting, joined by Powell and Rehnquist, J.J.).

At this level of government—staff assistants of Members—long accepted concepts of separation of powers dictate, for me, that until Congress legislates otherwise as to employment standards for its own staffs, judicial power in this area is circumscribed.

Id. at 250 (emphasis added).

Cf. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 501-02 (1977) (Powell, J., concurring in part and concurring in the judgment).

¹⁰⁴ *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 446 (1977).

¹⁰⁵ Sixty-five public laws and Executive orders mandating equal employment opportunity were in effect as of the summer of 1978. General Accounting Office, *A Compilation of Federal Laws and Executive Orders for Nondiscrimination and Equal Opportunity Programs*, HRD 78-138, Aug. 2, 1978, appendix I.

¹⁰⁶ To Eliminate Congressional and Federal Double Standards: Hearings on S. 1112 Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 96th Cong., 1st Sess. 2, 3, 4 (1979) (statement of Senator Leahy); *id.* at 8 (statement of Senator Cohen).

¹⁰⁷ See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

deliberately considered scheme of congressional self-regulation that invoked the assistance of the executive branch and the courts in a manner and to an extent that Congress explicitly declared to be necessary and not unduly disruptive of its legislative or other constitutional functions. Thus, while the

design of a statutory equal employment opportunity scheme for legislative branch employees may have constitutional implications beyond the speech or debate clause, the choice as a practical matter may be more a question of policy than of law.

3. Covering Key Congressional Aides and Advisors

Based on the speech or debate clause analysis in chapter 2, it appears that all congressional employees under *Davis v. Passman*¹ have at least a cause of action for damages against individual Members for unconstitutional discrimination even if Congress passes no new law. As noted in chapter 1, however, this damage action would be difficult to maintain.

The enactment of a comprehensive congressional equal employment opportunity scheme can overcome these litigation problems. But providing for a greater level of judicial and executive involvement in congressional employment relations than was involved in *Davis* may cause the Supreme Court to limit its holding that the speech or debate clause is coextensive with the separation of powers doctrine. The "undue disruption" standard addresses separation of powers concerns respecting broader issues of coordinate branch integrity and is applicable beyond the scope of speech or debate analysis. Chapter 2 concluded that, as a practical matter, whatever enforcement and remedial authority Congress chooses to give the other branches would answer any separation of powers questions.

The issue then becomes whether all or only some legislative branch employees should be covered by such a statute.

The work performed by the great majority of employees of congressional committees, various service units, and Member staffs, and the employment relations within these congressional operations, differs little from comparable jobs and employment relations in the executive branch, State and local

governments, and the private sector, nearly all of which are covered by Title VII.² These employees are not as directly and intimately involved in legitimate legislative functions as principal policy-making advisors. Generally they are not selected and hired primarily for their political savvy and know-how, but for certain skills less directly related to the legislative process. They are often hired, not by individual Members themselves or congressional committees, but by top staff assistants or quasi-bureaucratic structures that have responsibility for such hiring. Because many jobs in congressional service units are not closely tied to electoral changes, such employees are more likely to hold their positions for time periods not related to election year results. It is difficult to maintain that allowing executive and judicial enforcement of Title VII rights and remedies with respect to employees not directly and personally involved with the legislative process would unduly encroach upon Congress' constitutional functions.

Moreover, in the Commission's judgment, any disruption of the legislative process that might result from extending Title VII to these employees would be outweighed by the important and valid constitutional and policy objectives served by such a law.

The issue of whether executive or judicial branch enforcement of an equal employment statute would raise separation of powers problems is more acute, however, with regard to positions occupied by principal staff members who directly assist Members in legislative duties. Most Members and congressio-

¹ 442 U.S. 228 (1979).

² See discussion of exceptions to Title VII coverage in chapter 1, *supra*.

nal committee staffs have aides and advisors who personally and directly assist Members in legislative policymaking decisions. The work of such principal aides and advisors is often an important contribution to a Member's legislative functioning. Such advisors are intimately involved in legislating, are generally hired and fired by Members themselves, are expected to be sensitive and responsive to political considerations, and are generally employed only for as long as the Member for whom they work is in office. Including such advisors in a statutory employment scheme creates a potential for disruption of the legislative process and has constitutional implications that are not easily resolved.

The Commission has taken the position, and will continue to do so, that equal employment opportunity should be afforded to all persons regardless of their race, color, national origin, gender, religion, handicap, or age.³ Legislative branch employees, including principal aides and advisors, are no different from other workers in that they, too, have a right to be free from illegal discrimination in their employment.

Because of the potential for encroachment on the functioning of Congress, the question of whether executive or judicial agencies should be given authority to vindicate the rights of these principal advisors is a difficult one. The Commission is sensitive to the close professional rapport and personal respect that generally exists between Members and their principal staff advisors and recognizes it as an aspect of the legislative process that bears directly on the ability of Members to perform their duties and affects the constitutional functioning of Congress. While these legislative advisors do have a right to equal employment opportunity under the Constitution and the rules of both Houses,⁴ it is arguable that any involvement by the executive and judicial branches in enforcing these rights might impermissibly disrupt legislative functions. Even the threat of remedial intrusion by the two other branches might be sufficient to disrupt the Article I responsibilities of Congress.

The question that must be answered, then, is whether, and to what extent, involvement by the executive and judiciary in Congress' ability to select its principal policymaking staff members would be unduly disruptive of its constitutional functions. This is a question of fact and of degree—whether such involvement does, in fact, encroach on Congress' functions, and whether such encroachment is sufficiently disruptive to impair these functions. This involvement must then be balanced against the constitutional policy objective of eliminating all employment discrimination.

In determining whether invoking the aid of the other branches in extending Title VII to legislative employees would be impermissibly disruptive, two congressional functions under the Constitution must be considered: Congress' right to regulate its internal affairs and discipline its Members and Congress' responsibility to legislate. As a matter of law, such involvement by the executive and judiciary would not interfere with Congress' ability to regulate its own affairs, as applying Title VII to its own employees would be considered an exercise of Congress' self-disciplinary power and the involvement of the other branches merely an aid to enforcement of congressional will. Congress' right to discipline its Members would not be infringed by extending Title VII. Such a statute would merely provide concurrent jurisdiction and not preempt Congress' disciplinary rights under the Constitution.⁵

The question of whether enforcement of Title VII would encroach upon the legislative function of Congress is inherently a factual determination, and the Commission recognizes that Congress is best able to determine whether, as a matter of fact, its principal staff advisors should be covered by Title VII. In the past Congress has seen fit, albeit without extensive discussion of the issue, to exempt certain employees from Title VII who work in legislative and political institutions comparable to Congress at the State and local level. Section 701(f) exempts the "personal staff" of State and local elected officials.⁶

³ Congress should keep in mind the distinction between *lawful* employment discrimination on the basis of political ideology and *unlawful* employment discrimination on the basis of race, sex, religion, national origin, or religion. See *Branti v. Finkel*, 48 U.S.L.W. 4331 (Mar. 31, 1980).

⁴ U.S. Const. amend. V, Senate Rule I, Rules of the House, Rule XLIII, cl. 9.

⁵ See *Burton v. United States*, 202 U.S. 344, 366-67 (1906).

⁶ Section 701(f), 42 U.S.C. §2000e(f) (1976) states:

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any

person elected to public office in any state or political subdivision of any state by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to civil service laws of a state government, governmental agency or political subdivision. [emphasis added]

What eventually became section 701(f) was introduced on the Senate floor by Senator Sam Ervin. See, e.g., 118 Cong. Rec. 4483 (1972). In response to

The White House Office, which is also comparable to Congress in the sensitivity of its political functions, is neither clearly included nor excluded from Title VII.⁷ President Carter, however, has decided that Title VII applies to the White House Office, but does not cover "those positions . . . which are filled by individuals serving as close advisors to the President and Vice President."⁸ In both of these instances, however, there is no indication that either Congress or the President considered the competing constitutional and policy considerations discussed in this chapter when reaching their decision.

To the extent that there are constitutional problems with applying Title VII to principal staff aides, however, Congress can work to minimize the problems it identifies. If Congress decides that certain remedies, certain procedures, or certain enforcement agencies⁹ are potentially more intrusive

than others, it can tailor them as necessary or choose the least disruptive option.¹⁰ Regardless of the type of protection agreed upon, if Congress ultimately decides to grant its policy advisors statutory coverage, its decision would be accorded great deference by the courts in the face of a subsequent challenge based on the separation of powers doctrine.¹¹ As a practical matter, any congressional determination as to whether or not to cover its principal aides will probably resolve any separation of powers issues; it remains to Congress to decide whether it can resolve those factual problems that it finds. Regardless of what Congress decides as to its principal aides, however, it can and should take legislative action to guarantee equal employment opportunity to that much larger class of congressional employees not intimately involved in the legislative process.

exchanges with Senators Harrison Williams and Jacob Javits, Senator Ervin added the phrase "or any person chosen by such [an elected] officer to be a personal assistant" to his amendment (emphasis added). The relevant part of that exchange is as follows:

Senator Williams: . . . The second degree relates to other people who are covered. That is basically the purpose of the amendment, to exempt from coverage those who are chosen by the Governor or the mayor or the county supervisor, whatever the elected official is, and who are in a close personal relationship and an immediate relationship with him. Those who are his first line of advisers. Is that basically the purpose of the Senator's amendment?

Senator Ervin: . . . I would say to my good friend from New Jersey that that is the purpose of the amendment. I feel that those elected officials who are legal advisers or who are personal assistants or legal advisers, as to how he should exercise his constitutional, legal rights and responsibilities, should also be exempt. That is the purpose of the amendment, yes.

Senator Javits: . . . Mr. President, I trust that it will be satisfactory and I join with the Senator from New Jersey (Mr. Williams) in the proposal. However, I want to be sure that we have no difference of opinion as to what it means. . . .

I have no desire to argue about the fine points of some particular appointment, but generally speaking we consider a personal assistant as being a secretary or, as I have, an administrative assistant, a legislative aide, and then a mayor may have four assistants.

So that is what we would understand a personal assistant to be. "A secretary," of course, is an accurate designation. He may have two or three secretaries. Important people have more than one. . . .

So, if we understand each other on that score, this is entirely satisfactory to me. Do I understand correctly, then, that we agree on this?

Senator Ervin: . . . Yes. In other words, I think that the change that has been made makes it clear. I recognize that language sometimes is difficult to write, so that it may properly express ideas intended to be expressed. However, the suggested change would, I think, express our objective in accordance with what the Senator would expect.

118 Cong. Rec. 4492-93 (emphasis added). Senator Ervin's amendment was then adopted by the Senate by a vote of 69-2, 118 Cong. Rec. 4494 (1972) and the bill was forwarded to conference.

The House had voted not to extend Title VII to cover State and local employees. The conference committee, after explaining the Senate's decision to extend Title VII to State and local governments with Senator Ervin's exception to this extension, then modified the exception to its present form as it appears in §701(f). This changed the exception from "personal assistants" to elected officers to "personal staff" of elected officers. Equal Employment Opportunity Act of 1972, Conference Report, S. Rep. No. 92-681, 92d Cong., 2d Sess. 15 (1972). The conference committee stated in relevant part: "It is the intention of the conferees to exempt elected officials and members of their personal staff. . . . It is the conferees' intent that this exemption shall be construed narrowly." *Id.* at 15-16. The exemption explicitly excludes those employees subject to civil service laws.

⁷ 42 U.S.C. §2000e(16)(a) (1976).

⁸ Letter from Douglas B. Huron, Senior Associate Counsel to the President, to Eileen M. Stein, General Counsel, U.S. Commission on Civil Rights, May 1, 1980.

⁹ In weighing the relative merits of purely internal and external enforcement mechanisms, certain constitutional considerations affecting the efficacy of the remedies should be reviewed. See chapter 4, *infra*.

¹⁰ Congress should note that, even if a statute were enacted covering top aides, a qualified good faith immunity based on a constitutional privilege founded on Article I may be available where a Member can show that a particular employment decision was necessary to preserve his or her effective functioning in the legislative process. *Cf. United States v. Nixon*, 418 U.S. 683 (1974) (recognition of a qualified executive privilege which is fundamental to the operation of government); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) (executive privilege exists for the benefit of the Republic and the incumbent President may assert it within its recognized scope).

¹¹ See discussion of the undue disruption standard in chapter 2, *supra*.

4. Principal Constitutional Prerequisites to Judicial and Administrative Enforcement

Chapter 2 concluded that the separation of powers issues that arise when extending equal employment opportunity rights to legislative branch employees could most probably be resolved by a deliberately considered scheme which clearly articulated a congressional determination that coordinate branch involvement was required and would not unduly disrupt Congress' constitutional functioning. With the possible exception of top congressional aides and advisors, therefore, the Constitution presents no insurmountable barriers prohibiting Congress from making its employment practices subject to the same equal opportunity obligations as are the practices of other employers. To do so requires only congressional action.

There are, however, diverse methods by which Congress could pursue such a course. The conceivable variety of enforcement schemes that are available to implement any congressional equal employment opportunity plan precludes their presentation in this report.¹ While the choice of method is essentially a question of policy, there are constitutional principles and consequences that are involved and must be considered when deciding which approach to adopt. This chapter discusses those constitutional issues that accompany the key initial decision of whether to provide equal employment

opportunity statutorily or by congressional rule. These issues concern constitutional requirements that must be complied with if there is to be judicial or administrative enforcement of whatever rights are created.

Rules and Statutes

Congress may provide for the regulation of its internal affairs, which includes providing equal employment opportunity rights to congressional employees, by either rule or statute. It is this initial decision of whether to require equal employment opportunity by rule or by statute that delimits the principal boundary separating the possible methods by which Congress may create equal employment opportunity rights for its employees.²

Article I, §5, cl. 2, of the Constitution provides that: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and with the Concurrence of two-thirds, expel a Member." It was pursuant to this constitutional rulemaking authority that both the House and the Senate adopted the rules prohibiting employment discrimination that currently operate.³

¹ Beyond the threshold issue of how to extend equal employment opportunity rights to congressional employees are additional substantive questions concerning the nature and scope of the right to be created and the procedures required to enforce those rights. The ultimate effectiveness of any plan designed to afford protections to congressional employees will, in large part, depend upon the authority of the entity designated to administer the plan and the procedures available for employees and applicants to press their claims in the courts.

² This is not to suggest that enacting legislation and creating congressional rules are mutually exclusive. A dual system under which Congress

maintains independent authority to punish its Members for discriminatory employment practices and employees can seek relief for the violation of a statute that prohibits the same behavior is permissible.

³ House Rule XLIII, cl. 9, was adopted by H.R. Res. 5, 94th Cong., 2d Sess. 20 (1975). See Jefferson's Manual & Rules of the House of Representatives, H.R. Doc. No. 95-403, 96th Cong., 1st Sess. §939 (1979) (hereafter cited as "Rules of the House"). Senate Rule L was adopted by S. Res. 110, 95th Cong., 1st Sess., 123 Cong. Rec. S5396 (1979). See chapter I for discussion of these rules.

Rules are adopted separately by each House upon the passage of a simple resolution by majority vote.⁴ The scope of congressional rules is, therefore, limited to matters exclusively within the jurisdiction of either House.⁵ Consequently, legislative branch employees who are not considered employees of the House of Representatives or of the Senate are probably not subject to antidiscrimination rules.⁶

Within this rulemaking framework Congress has the greatest latitude. The Constitution explicitly links Congress' rulemaking power with its power to punish its Members.⁷ It is, therefore, possible for Congress to establish by rule internal administrative procedures and mechanisms to enforce its substantive rules:

The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house. . . . The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house. . . .⁸

Pursuant to this authority both Houses of Congress have established committees to investigate Member misconduct and make findings and recommendations to their respective Houses.⁹ Under this constitutional housekeeping provision, punishment can include either censure or expulsion of a Member.¹⁰ Congress has also recently developed other less harsh measures for disciplining its Members that include fines, loss of committee chairmanships, reprimands, and denial of the right to vote.¹¹

⁴ Riddick, *Senate Procedure*, S. Doc. No. 93-21, 93rd Cong., 1st Sess. 775 (1974) (hereafter cited as "Senate Procedure"); Rules of the House, *supra* note 3, §508.

⁵ Senate Procedure, *supra* note 4, at 769; Rules of the House, *supra* note 3, §§686(a) and (b).

⁶ Both House Rule XLIII and Senate Rule L, *supra* note 3, use the phrase "Member, officer, or employee" of the House and Senate, respectively. House Rule XLIII, cl. 11, defines the phrase as follows:

As used in this Code of Official Conduct of the House of Representatives—(a) the terms "Member" and "Member of the House of Representatives" include the Resident Commissioner from Puerto Rico and each Delegate to the House; and (b) the term "officer or employee of the House of Representatives" means any individual whose compensation is disbursed by the Clerk of the House of Representatives.

Rules of the House, *supra* note 3, §939(11). See also Senate Comm. on Governmental Affairs, *Lee Metcalf Fair Employment Relations Resolution*, S. Rep. No. 729, 95th Cong., 2d Sess. 9-10 (1978). Employers of some

Thus, a purely internal regulatory scheme created by the congressional rulemaking power is possible, at least with respect to employees of each House. Nevertheless, a decision to bring congressional employees within the ambit of antidiscrimination protections by rule, as contrasted with adopting such a plan by enacting legislation, is not merely a matter of form but has significant substantive legal consequences as well. These consequences need to be considered from a policy and legal perspective.

The distinction between congressional rules and statutory law is most pronounced with respect to enforcement issues. These enforcement considerations concern, first, the effectiveness of any congressional self-enforcement by rule and, second, the availability of judicial review.

The ability of Congress to maintain an effective internal procedure for adjudicating allegations of discrimination against its Members has been seriously questioned.¹² The history of congressional restraint when policing its own Members portends less than rigorous enforcement of any internally administered and enforced equal employment opportunity program. Congress has only reluctantly and infrequently used its self-disciplinary authority. Over the course of Congress' almost 200-year existence, only 7 Senators, 19 Representatives, and 1 territorial delegate have been formally censured for misconduct and 15 Senators and 3 Representatives expelled.¹³ Moreover, this congressional reluctance may well reflect, as the Supreme Court has noted, an inherent institutional disability:

Congress is ill-equipped to investigate, try and punish its members for the wide range of behavior that is loosely and incidentally related to the legislative process. In this sense, the English analogy. . . [is] inapt. Parliament is itself "The High Court of Parliament"—the

administrative service units, such as the Congressional Budget Office, are statutorily designated to be considered employees of the House of Representatives for purposes of determining employment rights. 2 U.S.C. §601(b)(1976). Cf. 5 U.S.C. §2107 (1976) (statutory definition of a congressional employee).

⁷ U.S. Const. art. I, §5, cl. 2.

⁸ *United States v. Ballin*, 144 U.S. 1, 5 (1892).

⁹ House Committee on Standards of Official Conduct; Senate Select Committee on Ethics.

¹⁰ U.S. Const. art. I, §5.

¹¹ *Congressional Quarterly's Guide to Congress*, 681-714 (2d ed. 1976).

¹² See *To Eliminate Congressional and Federal Double Standards: Hearings on S. 1112 Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 77 (1979) (testimony of Althea Simmons, director, Washington Bureau of the National Association for the Advancement of Colored People) (hereafter cited as "Senate Hearings").

¹³ *Congressional Quarterly's Guide to Congress*, *supra* note 11, at 703.

highest court in the land—and its judicial tradition better equips it for judicial tasks.¹⁴

The Court also said that "the independence of individual members might actually be impaired" if Congress "[took] on itself the responsibility to police and prosecute the myriad activities of its Members related to but not directly a part of the legislative function."¹⁵ The Court articulated an important concern when it questioned the assumption that internal congressional self-enforcement of its rules "would be wholly objective and free from consideration of party politics and the passions of the moment."¹⁶

In addition to the difficulties with internal enforcement, congressional rules cannot be enforced externally by the courts.¹⁷ The restrictions on judicial enforcement of congressional rules are twofold. First, a statute describing the cause of action is required to establish jurisdiction in the Federal courts.¹⁸ Second, even a statute cannot extend the jurisdiction of the courts beyond the limitations on jurisdiction established by the Constitution.¹⁹ The Constitution requires that legislative branch equal employment opportunity protections be statutorily provided if judicial review is to be available. Neither

a rule that itself explicitly provides for judicial review nor a separate statute granting jurisdiction to enforce congressional rules would evade constitutional prohibitions.

Federal courts are courts of limited jurisdiction. They may exercise only that judicial power provided by the Constitution in Article III and conferred by Congress.²⁰ Article III, §2, which provides the scope of jurisdiction Congress may give the courts, states in pertinent part:

The judicial power shall extend to all cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made. . . .

Congressional rules are not "law" as that term is used in the Constitution and understood by Congress. The Framers of the Constitution used the term "law" to describe the end result of a legislative process whereby a bill must be passed by a majority of the Members of a bicameral legislature and then be presented to the President for approval.

The bill then becomes law if the President approves and signs the bill or, if disapproved, upon

¹⁴ *United States v. Brewster*, 408 U.S. 501, 518 (1972).

¹⁵ *Id.* at 519.

¹⁶ *Id.* at 519-20.

¹⁷ See notes 18-20 and accompanying text, *infra*. While the courts could not enforce congressional rules, judicial review of allegations that the employment practices of a Member of Congress were unconstitutional would, nevertheless, be available under *Davis v. Passman*, 442 U.S. 228 (1979). In the recent case of *Carlson v. Green*, 100 S. Ct. 1468 (1980), the Supreme Court set out the rules that control the continuing availability of a *Bivens*-type action in the presence of possible alternatives. *Carlson* involved a *Bivens*-type action, based on the provision against cruel and unusual punishment contained in the eighth amendment, which would also have been supportable in a suit brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. §2680(h) (1976). The suit was brought on behalf of the estate of a deceased former Federal prisoner alleging that personal injuries which the prisoner suffered and from which he died resulted from the defendant's deliberate indifference to the prisoner's serious medical needs. The Court in *Carlson* stated that judicially implied causes of action directly under the Constitution survive the availability of alternative legislative means of redress with but two limited exceptions. Litigation by congressional employees patterned after *Davis v. Passman* would remain available unless either, (1) there exist "special factors counselling hesitation," or (2) Congress were to provide "an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Id.* at 1472. As the Court in *Davis v. Passman* noted, a suit against a Member of Congress alleging unconstitutional actions undertaken in the course of official conduct "does raise special concerns counselling hesitation," but held that "these concerns are coextensive with the Speech or Debate Clause." 442 U.S. at 246.

Under the second test advanced by *Carlson*, Congress can itself obviate *Davis v. Passman*, *Bivens*-type actions. The procedure by which Congress could statutorily foreclose *Bivens*-type actions in the congressional employment context remains to be elaborated by cases that implement the holding in *Carlson*. Two conclusions, nevertheless, seem apparent. First, any purely internal scheme established by rule to protect employees of the Congress from discriminatory personnel practices would not foreclose independent judicial consideration of a claim based directly on the

Constitution. Secondly, litigation under *Bivens* can only be averted by a statute that is explicitly intended to replace the constitutional remedy and that is equally as effective. It is unclear from *Carlson* whether the determination of the equivalent effectiveness of any alternative is solely a congressional prerogative. The inquiry undertaken by the Court in *Carlson*, however, reveals some of the criteria by which equivalent effectiveness is to be judged. The Court found four factors supporting its view that the FTCA could not be considered as effective an avenue of redress as a constitutional claim. Three of those factors are relevant to any consideration of exclusive remedies in the area of congressional employment. First, the Court found the *personal accountability* of a defendant in a *Bivens*-type action to be a more effective deterrent than the remedy against the sovereign provided by the FTCA. Additionally, the Court found that the unavailability of either *punitive damages* or a *jury trial* in a suit brought under the FTCA made it a less effective method of vindicating constitutional rights and hence not a possible substitute for litigation brought directly under the Constitution. 100 S. Ct. at 1473-74.

¹⁸ *Powell v. McCormack*, 395 U.S. 486, 512-13 (1969), quoting *Baker v. Carr*, 369 U.S. 186, 198-99 (1962); *Senate Select Committee v. Nixon*, 366 F. Supp. 51, 61 (D.D.C. 1973). *Cf. Pallmore v. United States*, 411 U.S. 389 (1973) (statutory grant of jurisdiction to the courts of the District of Columbia); *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922) (rejection of Federal court power to enjoin State court proceedings absent a statute conferring jurisdiction). The present "Federal question" jurisdiction statutes are insufficient to permit judicial review of claims that a congressional rule has been violated. Section 1331 of Title 28 of the U.S. Code in relevant part requires that an action arise under the "Constitution, laws, or treaties of the United States." To be cognizable under section 1343(4), the action must be authorized by "law" and, additionally, must seek relief for the deprivation of rights protected by an "Act of Congress." The essential question, likely to be answered in the negative, would be whether the term "law" contained in those statutes encompasses a resolution adopted by a single House of Congress. See text accompanying notes 19-23, *infra*.

¹⁹ *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809).

²⁰ See note 18, *supra*. All other judicial power or jurisdiction is reserved to the States.

consideration and passage by a two-thirds vote of each House of Congress.²¹ That the Framers intended this legislative process to be the sole means of creating law is reinforced by Article I, §7, cl. 3, which states:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

This provision of the Constitution has never been construed by the Supreme Court. However, in 1897, the Senate Judiciary Committee construed the word "necessary" as referring "to the necessity occasioned by the requirement of other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two Houses; and every resolution not so requiring such concurrent action, to wit, not involving the exercise of legislative powers, need not be presented to the President."²²

²¹ U.S. Const. art. I, §7. A bill may also become law 10 days after being presented to the President without his signature so long as Congress has not by adjournment prevented its return. If Congress has adjourned, the President by "pocket veto" can prevent its becoming law.

²² Senate Procedure, *supra* note 4, at 765.

²³ *Id.* at 769. Similarly, Riddick also states:

Concurrent resolutions are not used for the purpose of enacting legislation and are not binding or of legal effect and are not presented to the President of the United States for his approval, but would be required to be presented to him only if they contained matter which is properly regarded as legislative in character and effect.

Id. at 278. See also Rules of the House, *supra* note 3, at §§396-97. Joint resolutions, however, are signed by the President and have the force and effect of law. Senate Procedure, *supra* note 4, at 162-63.

²⁴ *Yellin v. United States*, 374 U.S. 109 (1963); *Christoffel v. United States*, 338 U.S. 84 (1949). See also *United States v. Smith*, 286 U.S. 6 (1932). Congressional requests that the judiciary enforce contempt citations against third parties for actions relating to proceedings held in violation of congressional rules entail different jurisdictional considerations than those raised if the courts were directly requested to enforce congressional compliance with legislative rules. Nevertheless, if in a particular employment discrimination case, jurisdiction is established under *Davis v. Passman*, see note 17, *supra*, courts will likely look to existing rules as expressions of congressional understanding regarding the behavior of its Members. *Christoffel v. United States*, 338 U.S. at 87-89. Cf. *Davis v. Passman*, *supra* note 17, at 243-44 n.21 (rules acknowledged but reviewed as ineffective.)

²⁵ In *Senate Select Committee v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973), the district court held, *inter alia*, that a congressional rule was legally insufficient to provide jurisdiction. *Id.* at 56 n.8. There, the Senate Select Committee sought relief as to the validity of two subpoenas issued against the former President and asserted as the basis of jurisdiction 28 U.S.C. §1345, which grants the district courts "jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by an agency or officer

This narrow construction of the legal effect of congressional rules is also supported by congressional precedent. Riddick on *Senate Procedure* states: "In response to a parliamentary inquiry the Chair stated that a Senate resolution has no legal effect but is used in dealing with nonlegislative matters exclusively within the jurisdiction of the Senate."²³

This is not to say that congressional rules are ignored by the courts. When the jurisdictional basis for decision has been otherwise provided, courts have construed congressional rules and held that congressional action must conform to their dictates. For instance, the Supreme Court has reversed convictions for contempt of Congress when the alleged contempt occurred before congressional committees that failed to follow procedures established by rule and thereby prejudiced the defendant.²⁴ In no case, however, has a court found jurisdiction to lie solely on the basis of a violation of a rule.²⁵ Equal employment opportunity rights conferred by congressional rule are, therefore, not likely to be enforceable by the judiciary until they are enacted into statutory law.²⁶

Judicial review of a statutory equal employment opportunity scheme could easily be provided without constitutional problems. The only questions

thereof expressly authorized to sue by Act of Congress." The court noted the related statutory provision, 28 U.S.C. §516, which establishes the Department of Justice as the representative of the United States in litigation:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency or officer thereof is a party, or is interested and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General. 28 U.S.C. §516 (1976).

The Select Committee asserted that it was empowered to bring suit on behalf of the United States as authorized by a resolution of the Senate, which states in relevant part:

[A]ny committee of the Senate is hereby authorized to bring suit on behalf of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers invested in it or the duties imposed upon it. . . .

S. Res. 262, 70th Cong., 1st Sess. (1928).

The district court rejected the Committee's contention, noting, *inter alia*, that section 516 required exceptions to its operations to be "authorized by law" and stated that "[a]lthough the question has never been specifically litigated, it seems apparent that 'law' in §516 would not include a legislative action of the sort represented by S. Res. 262." The court concluded that "the term law does not normally encompass within its definition [a] resolution. . . ." 366 F. Supp. at 56 n.8. The court's decision was most importantly premised on its finding that the resolution in question was not intended to provide jurisdiction, but rather to grant standing to the committee when jurisdiction was otherwise provided.

²⁶ Rules issued by executive branch agencies do have the force and effect of law and are enforceable when promulgated pursuant to a specific statutory delegation of legislative authority. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96, 304 (1979).

would concern the scope, timing, and parties able to seek such review.²⁷

Appointments Clause Considerations

If a statutory scheme were enacted, the appointments clause of the Constitution²⁸ would require that any agency responsible for the administration of that law be headed by an official appointed by the President. This requirement is based on the separation of powers doctrine that actions entailing executive power be vested in the executive branch. It need not, however, prevent Congress from placing administrative responsibility in an agency with which it has a structurally and functionally close relationship.

The case of *Buckley v. Valeo*²⁹ establishes some of the limits of congressional control over an administrative enforcement agency. In *Buckley* the Supreme Court resolved a constitutional challenge to a Federal statutory scheme regulating political campaigns.³⁰ The challenge included a constitutional attack, based on the appointments clause, on the statutorily prescribed composition of the Federal Elections Commission (FEC).³¹

The appointments clause grants the President the power to nominate and, with the advice and consent of the Senate, to appoint all officers of the United States whose appointments are not otherwise provided for by the Constitution. The appointments clause also permits Congress to vest the appointment of such inferior officers as it thinks proper in the President alone, in the courts, or in the heads of departments.

²⁷ Permitting individual causes of action, class suits, independent *de novo* judicial review, and additional independent remedies or requiring exhaustion of certain administrative procedures are among various questions concerning the scope and timeliness of judicial review that Congress may wish to address when adopting such a plan. Moreover, even if Congress fails to address such issues statutorily, there exist various judicially created rules that the courts themselves can use to resolve these questions. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Brown v. Gen. Servs. Administration*, 425 U.S. 820 (1976); *Cort v. Ash*, 422 U.S. 66 (1975); *Fed. R. Civ. P.* 23.

²⁸ U.S. Const. art. II, §2, cl. 2.

²⁹ 424 U.S. 1 (1976).

³⁰ The statutes attacked included the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C.) as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.); I.R.C. §§6096, 9002-90012, as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §§403-406.

³¹ The Commission was to have consisted of eight members. Of the six voting members, two each were to be appointed by the Speaker of the House of Representatives and the President *pro tempore* of the Senate upon the recommendation of the majority and minority leaders of the respective Houses. The two remaining voting members were to be Presidential

Any inquiry into the strictures of the appointments clause must of necessity be undertaken in the context of the fundamental principles of our tripartite system.³² As the Court in *Buckley* stated, "the term 'Officers of the United States' must be construed within the doctrine of separation of powers."³³ While the Constitution contemplates neither a total separation nor a "hermetic" sealing off of the three essential branches, they are and must remain separate and distinct:

[T]he rule is that. . . Congress should exercise the legislative power, the President. . . the executive power, and the Courts. . . the judicial power. . . [I]t is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power.³⁴

Congress can create agencies supportive of itself, the members of which need not be appointed by the President. So long as an agency performs only legislative, and neither executive nor judicial functions, its composition is unaffected by the dictates of the appointments clause. Congress, *Buckley* held, might create and appoint the members to an agency that has "those powers which Congress might delegate to its own committees."³⁵ Such an agency would operate "in aid of congressional authority to legislate" and, if "sufficiently removed from the administration and enforcement of public law," its administrative directors would not be held "Officers of the United States."³⁶

appointees. 424 U.S. at 113. The questioned statute vested the FEC with recordkeeping, disclosure, and investigative functions and also extensive rulemaking and adjudicative powers. The adjudicative and rulemaking functions that the statute attempted to vest in the FEC were similar to those exercised by the Equal Employment Opportunity Commission under its authority to administer Title VII. The FEC was authorized to promulgate regulations, formulate general policy, issue advisory opinions, initiate civil actions, and make findings of violations. *Id.* at 109-13. The Supreme Court permitted the FEC to continue to exercise its investigative and informative functions as they were in support of legislative activity and, therefore, did not require compliance with the appointments clause. *Id.* at 142. The Court denied the FEC its authority to exercise its broad administrative powers. *Id.* at 140.

³² The Court cited Art. I, §1, which vests legislative power in the Congress; Art. II, §1, which vests the executive power in the President; Art. III, §1, which vests the judicial power in the courts; and the ineligibility and incompatibility clauses in Art. I, §6, as the cognate constitutional expressions of the separation of powers doctrine. 424 U.S. at 124.

³³ 424 U.S. at 119.

³⁴ *Id.* at 121-22 (quoting from *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1927)).

³⁵ 424 U.S. at 137.

³⁶ *Id.* at 141. The Court stated that "[L]egislative power as distinguished

However, the Court concluded that "any appointee exercising significant authority pursuant to the laws of the United States must be appointed in the manner prescribed."³⁷ Members of an agency charged with administering and enforcing the laws of the United States are "Officers of the United States," and the appointments clause provides the exclusive method by which officers of the United States may be selected.³⁸

The Supreme Court stated that the clause, and in particular the term "Officers of the United States," could not be understood merely as advancing a "frivolous purpose" "dealing with etiquette or protocol" but rather, when examined in the context of related constitutional provisions, was "intended to have substantive meaning."³⁹

That all persons who can be said to hold an office under the government. . . established under the Constitution were intended to be included within the one or the other of. . . [the two] modes of appointment [which the clause sets out] there can be but little doubt.⁴⁰

There are no exceptions to the appointments clause. *Buckley* makes clear that application of the appointments clause is not dependent upon an

agency's designated structural placement within any particular branch of government.⁴¹ Rather, application of the clause is solely dependent on a functional analysis of the scope of the agency's operations. In sum, an agency with executive functions and responsibility for administering and enforcing the law is by definition headed by officers of the United States who must be chosen in the prescribed manner.⁴²

The appointments clause textually specifies that its requirements apply only to those appointments that are not "otherwise provided for" in the Constitution. The Court, however, limited the applicability of any other possibly relevant constitutional provision, concluding that "there is no [other] provision of the Constitution remotely providing any alternative means for the selection of the members of the Commission or for anybody like them."⁴³

The Court also refused to limit the applicability of the appointments clause merely because the substantive area of legislation is one in which Congress is granted explicit and plenary constitutional powers. The legislative authority to regulate elections, although both textually granted to Congress⁴⁴ and augmented by the provision that "[each] house shall

from executive power is the authority to make laws." *Id.* at 139 (quoting from *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928)). The Court stated that "powers. . . [which] are essentially of an investigative and informative nature" and "the power of inquiry—with enforcing powers—[because it is] a necessary and proper attribute" are encompassed within the legislative authority. *Id.* at 137-38 (quoting in part from *McGrain v. Daugherty*, 217 U.S. 137, 175 (1927)).

For example, the Congressional Budget Office, created by the Congressional Budget and Impoundment Control Act of 1974 (codified at 2 U.S.C. §§602-604 (1976)), is part of the informing machinery of the Congress providing that body, its committees and individual Members, with information pertaining to the budget, appropriations bills, revenues, receipts, and tax expenditures. 2 U.S.C. §602 (1976). The Director of the Congressional Budget Office has authority to secure information directly from agencies and Departments in the executive branch, 2 U.S.C. §601(d) (1976), and from agencies in the legislative branch, 2 U.S.C. §601(e) (1976). Consistent with the fact that the function of the Congressional Budget Office could have been delegated to a committee of either House, its director is not a Presidential appointee. The director is appointed by the Speaker of the House and the President *pro tempore* of the Senate after consideration of the Committees on the Budget from the House and Senate, 2 U.S.C. §601(a)(2)(1976), and may be removed by resolution of either House, 2 U.S.C. §601(a)(4)(1976).

The Office of Technology Assessment, established by the Technology Assessment Act of 1971 (codified at 2 U.S.C. §471 (1976)), provides information concerning "early indications of the probably beneficial and adverse impact of the application of technology and. . . develop(s) other coordinate information which may assist Congress. . . ." 2 U.S.C. §472(6)(1976). Again, because this office only serves to inform and advise the Congress, its director is not an officer of the United States who must be appointed by the President. The director is appointed by a technology assessment board for a term of 6 years unless prematurely removed by that board, 2 U.S.C. §474(a)(1976). The board is composed of the director, six members of the Senate appointed by the President *pro tempore* of the Senate, and six members of the House appointed by the Speaker of the House, 2 U.S.C. §474(a)(1976). The board is specifically authorized to issue

subpenas for the attendance of witnesses and the production of documents. 2 U.S.C. §473(a)(1976).

³⁷ 424 U.S. at 126. The Court found considerable support for its holding in the intent of the Framers both as expressed in the debates during the Constitutional Convention and as evidenced by the evolution of the drafts of the Constitution during the course of that convention. *Id.* at 129-31. As the Court noted, "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the legislative branch of the national government will aggrandize itself at the expense of the other two branches." *Id.* at 129.

³⁸ *Id.* at 127.

³⁹ *Id.* at 125, 126.

⁴⁰ *Id.* at 125 (quoting from *United States v. Germaine*, 99 U.S. 508, 510 (1879)).

⁴¹ The Court noted that officers of either chamber of Congress, such as the Clerk of the House, are elected pursuant to internal rules, and are statutorily designated as "Officers of Congress," but explicitly refrained from deciding whether such officers were also "officers of the United States" and thus subject to the requirements of the appointments clause. 42 U.S. at 128. The Court did state that nothing in the clause denies Congress "all power to appoint its own inferior officers to carry out appropriate legislative functions," making clear that applicability of the appointments clause is dependent only upon a functional analysis of the agency under consideration. *Id.*

⁴² *Id.* at 140-41.

⁴³ *Id.* at 127. The Court also noted that the Constitution otherwise provides for the appointed selection of the President *pro tempore* of the Senate, Art. I, §9, cl. 5, and Speaker of House, Art. I, §2, cl. 5, and consequently found no conflict between such congressional power and the requirements of the appointments clause. *Id.* at 127-28. However, the Court refrained from determining whether such congressional officers are "Officers of the United States" whose appointment is otherwise provided for within the meaning of the clause. *Id.* at 128.

⁴⁴ U.S. Const. art. I, §4, confers on the Congress authority to regulate "the Times, Places and Manner of holding Elections for Senators and Representatives."

be the judge of the elections, returns, and qualification of its own members,"⁴⁴ was held insufficient to remove the selection of FEC membership from the constitutionally mandated process.⁴⁵ Similarly, the Court found no restriction of the scope of the appointments clause in either the 12th amendment's grant of "judicial" power to Congress to regulate practices in connection with presidential elections⁴⁷ or in the "necessary and proper clause" of Article I.⁴⁸

Congress can, nonetheless, create an administrative agency, appointments to which are consistent with the appointments clause, and still retain considerable control over its operations. The appointments clause does not act to prevent Congress from protecting itself against excessive executive and judicial involvement in affairs intimately related to legislative functions. The possibility of providing equal employment opportunity rights to congressional employees by statute, while limiting executive involvement solely to the extent required by the appointments clause, is a viable option.

The Court referred to the General Accounting Office (GAO) as illustrative of the mandates of the appointments clause.⁴⁹ However, GAO is, perhaps, even more illustrative of the degree to which Congress can retain control of an agency administering programs concerning peculiarly legislative branch considerations and still conform to the appointments clause. GAO, created by the Budget and Accounting Act of 1921,⁵⁰ is statutorily desig-

nated an "agent of the Congress"⁵¹ within the legislative branch, as an agency "independent of the executive departments."⁵² Its chief administrative officer, the Comptroller General, is designated an "officer of the legislative branch"⁵³ and, while appointed by the President with the advice and consent of the Senate,⁵⁴ serves a single 15-year term⁵⁵ and can be removed prematurely only by impeachment or a joint resolution of Congress.⁵⁶ Moreover, the Comptroller General and his deputy are, by statute, directly responsible to Congress in the performance of their duties.⁵⁷ This unique close relationship to Congress is necessarily a consequence of GAO's main purpose of ensuring that congressional policy, as evidenced in appropriations bills and other legislation, is effectively implemented and administered by the executive branch.

GAO's independence of the executive branch was further enhanced by the enactment of the General Accounting Office Personnel Act of 1980.⁵⁸ The act requires the Comptroller General to establish by regulation an internal personnel system independent from the executive branch civil service system, but grants to GAO employees many of the same personnel rights as are enjoyed by their executive branch counterparts, including the right to be free from unlawful employment discrimination.⁵⁹ The self-contained administrative enforcement mecha-

⁴⁴ U.S. Const. art. I, §5.

⁴⁵ See 424 U.S. at 133.

⁴⁶ *Id.* at 134. U.S. Const. amend. XII provides that certificates of the votes of the electors be "sealed . . . [and] directed to the President of the Senate" and that the "President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

⁴⁷ *Id.* at 134-35.

⁴⁸ *Id.* at 128 n.165.

⁴⁹ 42 Stat. 20 (1921) (codified in scattered sections of 5, 6, 10, 14, 18, 28, 31, 34, 35, 39 U.S.C.). Numerous statutes enacted since 1921 have clarified GAO's functions and increased its program evaluation responsibilities substantially. See, e.g., Government Corporation Control Act of 1945, ch. 557, §2, 59 Stat. 597 (codified at 31 U.S.C. §841 (1976)); Legislative Reorganization Act of 1946, ch. 753, Title II, 60 Stat. 837 (codified at 31 U.S.C. §60 (1976)); Accounting & Auditing Act of 1950, ch. 946, Title I, 64 Stat. 838 (codified at 31 U.S.C. §65 (1976)); Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1167 (codified at 31 U.S.C. §130; (1976)); General Accounting Office Act of 1974, Pub. L. No. 93-604, 88 Stat. 1962 (codified at 31 U.S.C. §53c (1976)); Energy Policy and Conservation Act of 1975, 89 Stat. 874 (codified at 42 U.S.C. §6201 (1976)).

⁵⁰ 31 U.S.C. §65(d)(1976).

⁵¹ *Id.* at §41.

⁵² *Id.* at §41 n.1. But see *Brookfield Const. Co. v. Steward*, 234 F. Supp. 94, 99-100 (D.D.C. 1964), *aff'd* 339 F.2d 753 (the Comptroller General has the status of a legislative officer and an executive officer).

⁵³ 31 U.S.C. §42 (1976).

⁵⁴ *Id.* at §43.

⁵⁵ *Id.* Since 1921 there have been only five Comptrollers General of the United States. F. Mosher, *The GAO: The Quest for Accountability in American Government* 65 (1979).

⁵⁶ 31 U.S.C. §§59-60 (1976).

⁵⁷ Pub. L. No. 96-191, 94 Stat. 27 (1980) (to be codified in scattered sections of 5, 31 U.S.C.).

⁵⁸ Section 3(a)(B) incorporates by reference 5 U.S.C. §2302(b), which includes the following antidiscrimination provisions:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping conditions, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791);

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation. . . .

Section 3(g) requires generally that all personnel actions be taken "without regard to race, color, religion, age, sex, national origin, political affiliation, marital status or handicapping condition."

nism for employment rights granted by the act and implementing regulations²⁰ provides an example of how Congress can comply with the appointments clause without sacrificing needed legislative branch independence.²¹

Generally, the administrative enforcement of Title VII is presently entrusted to the Equal Employment Opportunity Commission (EEOC), the officers of which are selected in conformity with Article II requirements. It would be constitutionally permissi-

ble to extend the jurisdiction of the EEOC so as to include congressional employment practices. However, should Congress desire to place the enforcement functions of a congressional equal employment opportunity program in an agency less independent of the Congress than EEOC, it would be equally permissible either to place administrative responsibility in GAO or to create a similar "agent of Congress" and grant to it the responsibility to administer and enforce such legislation.

²⁰ Administrative enforcement of Title VII rights is not given to the Equal Employment Opportunity Commission. Instead, the act establishes a five-member "General Accounting Office Personnel Appeals Board" appointed by the Comptroller General to make determinations and order corrective action with regard to, *inter alia*, complaints of employment discrimination. Sec. 4(h), 4(i). Appellate judicial review of Board decisions is explicitly provided for in the act. Sec. 4(h), 4(i). Apparently, the provision for appellate judicial review is not intended to eliminate any additional right of *de novo* judicial review granted by applicable antidiscrimination legislation. Sec. 3(g)(3). *De novo* judicial review of a discrimination claim arising under Title VII of the Civil Rights Act of 1964 is probably still available to GAO employees and applicants pursuant to section 717(c) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-16(c)).

²¹ Two sentences in the House committee report on the bill suggest that one consideration favoring the legislation was that committee's conclusion that the separation of powers doctrine precluded executive branch

regulation of an "independent agency in the legislative branch." H.R. Rep. No. 96-494, 96th Cong., 1st Sess. 3-4 (1979). The Senate committee report on the bill makes no mention of the separation of powers doctrine, concluding only that "civil service laws governing such matters as appointments, classifying and grading positions, compensation, adverse action and appeals . . . do not readily accommodate the special needs of the GAO which arise from its unique status and responsibilities as an arm of Congress." S. Rep. No. 96-540, 96th Cong., 1st Sess. 3, 4 (1979), *reprinted in* [1980] U.S. Code Cong. & Ad. News 344, 343, 346. The principal motivation for the legislation, however, was the need to eliminate an apparent and potential "conflict of interest" between GAO's specific mandate to oversee the operation of the civil service merit system and the regulation of GAO employment practices and personnel by executive branch personnel agencies. S. Rep. No. 96-540, *id.*; H.R. Rep. No. 96-494, *id.* at 2-3.

Conclusions

Title VII of the Civil Rights Act of 1964 defines unlawful employment practices, thereby creating various equal employment opportunity rights and obligations. The act also establishes procedures for enforcing this substantive law through executive and judicial action. Congress has amended Title VII to cover most employers and employees in the private sector, State and local government, and the Federal executive branch. It has not extended such coverage, however, to the staff of Members of Congress, congressional committees, and many legislative support units. As a result, most legislative branch employees lack the equal employment opportunity rights and protections afforded most other employees in the country. The need to cover such employees through legislation based on Title VII is supported by congressional and private surveys that have documented the disproportionately small numbers of minorities and women working at numerous positions in Congress. Both the Senate and House have passed antidiscrimination rules, but neither set of rules provides meaningful enforcement mechanisms.

Davis v. Passman held that any congressional employee may sue a Member of Congress for damages for unconstitutional employment discrimination. Constitutional litigation, however, is inherently difficult, time-consuming, and expensive. The presence of many unresolved problems in this area of law even further limits the effectiveness of constitutional litigation as a method of protecting legislative branch employees from employment discrimination.

One of the issues not resolved in *Davis* is whether the speech or debate clause would bar such litigation.

According to the Supreme Court of the United States, the speech or debate clause protects only "legitimate legislative activities" from judicial or executive review. Supreme Court decisions make clear that congressional personnel decisions are not included within this category of activities unless taken by Member vote in committee. Even these votes, however, may be challenged by suits against congressional employees charged with implementing such decisions. Therefore, speech or debate clause immunity would not protect Congress from constitutional litigation challenging its employment practices.

If Congress enacts equal employment opportunity legislation based on Title VII covering legislative branch employees, separation of powers issues beyond speech or debate may be raised by the nature and extent of judicial and executive involvement in congressional affairs. Such involvement by other branches in congressional personnel decisions would be unconstitutional if it "unduly disrupts" the constitutional functions of Congress. The essential judgment under this standard would be primarily factual in nature. As most congressional employees are not directly and personally involved in the legislative process, any potential disruption that might result from extending legislation based on Title VII to them is outweighed by the important constitutional policy goals served by the law.

Coverage of those principal staff members who are intimately involved in legislative policy formulation creates a greater potential for disruption. If Congress, after weighing the facts, decides to include these employees within a statutory plan

guaranteeing equal employment opportunity and providing effective remedies for victims of employment discrimination, as a practical matter its decision will resolve any separation of powers problems that may exist.

Congress can constitutionally choose among numerous methods for enforcing congressional equal employment opportunity rights. Granting such rights by statute is more likely to ensure that congressional employees are provided effective protections than if such rights were granted by rule. To conform with the requirements of the appointments clause of the Constitution, any agency responsible for the administration and enforcement of such

statutorily established equal employment opportunity rights must be headed by an officer, or officers, appointed by the President. However, Congress can, consistent with the appointments clause, place responsibility for such administration and enforcement in an agency over which it has considerable control and protect itself from intrusive external involvement by the executive branch in legislative affairs.

Based on these conclusions, the Commission offers the following recommendations to assist Congress in choosing among the ways it may adhere to constitutional requirements, protect its institutional concerns, and secure equal employment opportunity for congressional employees.

Recommendations

1. Congress should enact a new provision in Title VII of the Civil Rights Act of 1964 to cover employees in the legislative branch modeled on §717 of Title VII.

a. This provision should establish a comprehensive and complementary scheme of administrative and judicial remedies and emphasize assistance for employees and informal conciliation.

b. Congress should designate a legislative agency headed by a Presidential appointee, such as the General Accounting Office, or create a new similarly constituted office, to administer this provision.

c. In carrying out its responsibilities under this new provision, the administering agency should follow judicial interpretations of Title VII, where applicable to the fact situation presented, in order to achieve a consistent and uniform body of equal employment opportunity law for all employers and employees covered by Title VII.

2. The Commission believes that all congressional employees should be guaranteed equal employment opportunities. With respect to positions occupied by

the principal staff members who provide direct and personal assistance in the formulation of legislative policy to Members or to committees, however, special rules or procedures may be needed in connection with the implementation of the new provision. Congress should authorize the legislative agency administering the new provision to review these positions and determine whether such special rules or procedures must be developed.

3. The proper party defendant in any proceeding under the new provision should be the individual Member or head of the legislative unit who has control over the terms and conditions of employment at issue. All defendants should be liable only in their official capacity. Where committee authority over personnel practices of committee staff or service unit employees exists, such authority should be delegated to the committee chairman or an appropriate staff member in order to avoid any difficulties that might be posed by speech or debate clause immunity.

Additional Statement by Vice Chairman Stephen Horn

Affirmative Action in Congress

The legislative branch of the American government has various multifaceted operations. First, there are the *nonpolitical service functions* such as those conducted by the employees of the Library of Congress, the General Accounting Office, Congressional Budget Office, Office of Technology Assessment, the Architect of the Capitol, and similar entities. Second, there are the *politically administered housekeeping functions* which include the various administrative services—whether of a computer, custodial, or security nature—responsible either to the Secretary of the Senate; the Clerk, Doorkeeper, or Postmaster of the House; or the Sergeant at Arms of either body. Each of these principal officers is selected by the party in the majority in a particular chamber, but each is also expected to provide services satisfactory to all members. Third, there are the more *politically involved legislative and policy analysis functions*—carried on by staffs which sometimes serve majority and minority separately and which seek to meet the needs of the members who serve on the various joint, standing, select, and special committees. In my opinion, there is no problem in extending a congressionally administered equal employment opportunity review system to employees who perform those three functions. Such a program must be wholly administered within the legislative branch. In a representative democracy, the legislative branch should never permit any of its personnel to be subjected to control by the executive branch.

But, there is a fourth category of legislative functions which I feel must be handled differently.

These are the more *politically oriented constituent service and legislative analysis functions* performed by the congressional office staff whose continued employment depends on the political fortunes of a particular legislator. But there would be a problem if an executive branch-type equal employment opportunity program were extended to those employees.

The relationship between senior congressional office staff and an elected official is a very personal one which by its nature involves not only competency and loyalty, but—among other factors—also involves some compatibility of attitude and values and a relationship to the member and the constituency. The daily actions or inactions of a staff member in relation to an elected official's constituency can affect that official's longevity within a 2-year period in the House of Representatives and within a 6-year period or less in the United States Senate. Congressional offices are busy places where, in general, the staff work long hours under great stress. On Capitol Hill, the 40-hour work weeks enjoyed by most in government and industry are usually a rare minimum rather than the maximum. When the personal chemistry and bonds of loyalty between the elected and the staff fade in a representative government, it is the staff member and not the elected official who leaves. Occasionally a Member of Congress has been challenged—sometimes successfully—in party primaries or in a general election by a former member of the staff. Should there be staff incompetency, an elected official must act rapidly in removing a staff member in order to salvage credibility with a constituency. If that staff member whose competen-

cy has been questioned is also a member of a "protected group" (e.g., female, minority, handicapped, etc.), then there is potential for that employee to inflict an extra amount of political damage on a former employer. Under those circumstances the opportunity for political mischiefmaking is great.

Thus, the remedy is *not* to impose a "civil service" type fair employment regulatory structure on those legislative arenas which remain in direct linkage with a particular constituency. The solution is to provide an outlet for a legitimate grievance and to have that grievance heard and judged by people who understand the political process. A subcommittee of the ethics committees of either House—evenly divided by party—is one possibility. Another possibility is the creation of a special congressional commission composed of retired and respected former Members of Congress who are not still

engaged in a professional career. Again, such a group should be evenly divided by party, and perhaps chaired by a member of the party which is not in majority control of the chamber involved. It is also possible that because of the highly "political" nature of senior office staff that they should be exempt from any coverage under an equal employment opportunity statute. That is a question which only the Congress can decide. It is clear that should some remedies be provided, while back pay might be an appropriate one, a remedy such as reinstatement would not be appropriate given the intimate political atmosphere in which an office staff must conduct its work. In brief, to paraphrase the legendary Mr. Dooley, immortalized by Finley Peter Dunne, just as "politics' ain't beanbag" . . . it also "ain't civil service."